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MALABAR LAW AND CUSTOM.

BY

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Indian Civil Service,

Judge of the High Court of Judicature at Madras.

THIRD EDITION.

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PREFACE TO THE THIRD EDITION.

SINCE the second edition of this book was published, I have revised and re-written it throughout. The alterations and additions that I have made are so considerable that I feel that I should not be justified in putting any name except my own on the title page.

MADRAS,
January, 1905.

LEWIS MOORE.

PREFACE TO THE SECOND EDITION.

Mr. Wigram, who had been District Judge of South Malabar from 1875 to 1882, brought out the first edition of this work in 1882. He retired from the Indian Civil Service in 1884, and it is no doubt due to his absence from India that no revised edition of the book has been published up till now. Mr. Wigram has been good enough, at my request, to authorize me to bring out a second edition of his Malabar Law and Custom corrected and revised in accordance with recent decisions, etc.

* * * *

A large number of books and papers of considerable importance in connection with Malabar Law and Custom have been published since Mr. Wigram wrote this book, among which I may mention Mr. Logan's Manual of Malabar, Sir Charles Turner's Minute on Malabar Land Tenures, the Report of the Malabar Marriage Commission, and a mass of papers and reports of debates connected with the law regarding the grant of compensation for improvements to tenants in Malabar. To all these books and papers I have made frequent reference in this edition.

* * * * *

Madras,
June, 1900.

LEWIS MOORE.

PREFACE TO THE FIRST EDITION.

More than a year ago, * * * the Translator of the District Court of North Malabar, placed in my hands four bulky manuscript volumes of decisions on Malabar Law and Custom which he had collected and arranged with considerable labor and research. With this material, which he has from time to time supplemented, I undertook the task of compiling a Commentary. To this I have added a short Introduction, descriptive of the country and the people who inhabit it.

The plan of the Commentary is to state, as concisely as possible, at the commencement of each Chapter, the existing law on the subject with which the Chapter deals, and then to support the statement piecemeal by quotations from decided cases and other official sources.

Every attempt thus to reduce unwritten law and custom to propositions must necessarily be imperfect, but I venture to hope that the book will be of use to those who are engaged in administering the law not only as a collection of precedents but as a guide to principles.

* * * *

Coimbatore,
August, 1882.

H. W.

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INTRODUCTION.

The aboriginal inhabitants of Malabar must be looked for among the Cherumans and Pulayans, slaves of the soil, who, until recently, were bought and sold with the land, and among the jungle tribes, such as the Kurumbans, Paniyans and Kurichians. These represent respectively the pastoral, agricultural and hunting tribes They have disappeared from the low country, but representatives of each race are still to be found in the forests of the Wynad, and the Kurumbans have left their name behind them on the coast.

The first wave of immigration brought in all probability the cultivators of the palm who are known by different names, such as Tiyans, Illuvans and Shanars. It is usually asserted that the word Tiyan is derived from Dvipam and signifies an islander, and that Illuvan is derived from Sinhala or Sihala (*i.e.*, Ceylon) (*a*).

The next wave of immigration brought the Nayars. It is commonly supposed that the word Nayar, Nayak, Nayudu (*b*), originally denoted the military as opposed to the agricultural division of the Dravidian tribes. The Nayars of Malabar have always been essentially a martial people, and, except in language, have but slight affinity to the Tamil Vellalans, Mudaliyans, Pillais and Goundans. They appear to have a closer resemblance to the Telugu Reddis.

(*a*) "The name Ceylon appears undoubtedly to be formed from *Sinhala* or *Sihala* 'lions abode'" the name adopted in the island itself at an early date. This with the addition of "Island" "*Sihala-Dvipa*" comes down to us in Cosmas as Σιελεδιβα (Anglo-Indian Glossary by Yule and Burnell, 2nd edition, p. 181).

(*b*) Nayar and Nayak come from the same Sanskrit origin (Yule and Burdell, 2nd edition, p. 615).

The Nayars as far as can be ascertained entered Malabar from the north and peopled first the Tulu and then the Malayalam country (*a*). All that can be predicated of them with any degree of certainty is that they were serpent worshippers, that they practised polyandry, and that certain of their customs point to a distinctly military organization.

(*a*) As to this it is observed as follows in the report of the Malabar Marriage Commission:—"Mr. Wigram's conjecture that the 'Nayars entered Malabar from the north and peopled first the Tulu and then the Malayalam country' seems inconsistent with the fact that the Nayars speak the purest Malayalam and that Malayalam is very much closer akin to Tamil than to either Tulu or Canarese spoken in South Canara. If the Nayars entered Malabar from the north they must surely have brought some words with them which would have disclosed their affinity to some northern people, whereas their language merely discloses a close affinity to Tamil and raises the presumption that they entered Malabar through the Palghat gap" (Report, p. 11).

There are, in my opinion, greater difficulties in accepting this view than there are in adopting Mr. Wigram's theory. Bishop Caldwell writes:—"The people by whom Malayalam is spoken must originally have been a colony of Tamilians. They must have entered the Malayalam country by the Palghat or Coimbatore gap and from thence spread themselves along the coast" (Caldwell's Dravidian Grammar, Introduction, p. 24). This is no doubt true of the Tiyans who are closely connected with the Shanars of Tinnevelly and Madura, but does it follow that it is true in the case of either Nayars or Nambudris? If the mass of the people in the country spoke Malayalam, would we not expect the new comers, whether Nayars or Numbudris, to adopt the language spoken all around them and by degrees to abandon and forget their mother tongues? The evidence as to where the Nayars came from is, in my opinion, too meagre to justify any dogmatic assertion as to their original domicile.

That the original Nayars were serpent worshippers is attested by the fact that to this day a form of serpent worship is maintained in every wealthy tarwad, and a corner of the compound set apart for snakes (*a*). Further, we have the tradition that at the time of the Aryan immigration, the country was peopled by serpents or serpent-faced men.

The warlike propensity of the Nayars is attested by the employment of implements of war in their household ceremonies, by the establishment in each village or Tara of a Kalari or gymnasium where their youth were taught to accustom themselves to the use of arms and perhaps also

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(*a*) An account of modern snake worship in Malabar is given in a little pamphlet recently published by a Nayar. He writes as follows :—

"Of the various kinds of primitive worship still practised in Malabar that of the serpent occupies a prominent place. Here the serpent is deified and offerings are often made to the reptile It has got a powerful hold upon the popular imagination. Each household has got its own serpent-deity possessing large powers for good as well as for evil. A separate spot is set apart in the house-compound as the abode of these deities. This reserved spot is converted into a small jungle almost circular in shape. It is overgrown with trees of various kinds and sh ubs, and sometimes medicinal plants also. In the middle this quasi-circular shrine images usually made of laterite after specified shapes are arranged in certain established methods and a passage is opened to the seat of these images from outside. This spot is so scrupulously reserved, so that not even domestic animals are allowed to stray therein. No trees from the place are to be felled down, nor any plant whatever for that matter with any metal or more particularly iron weapons; for these are unholy things, the introduction alone of which inside the sanctioned area, not to say the actual cutting down of the tree, is regarded as exceedingly distasteful to these serpent gods. They are not to be desecrated by the touch or even by the approach of a low-caste man Once in

by their isolated mode of living in the midst of fenced gardens. Their ballads, too, are said to teem with stories of the martial achievements of their heroes. It is probable that the Nayar kingdoms of Kolattanad and Walluvanad were always more or less independent of the Chera Kings, and that although the Nayars may have served as mercenary soldiers in the Chera army, they did not really spread southwards to Cochin and Travancore until the extinction of the Chera dynasty in the ninth century.

The third wave of immigration brought the Nambudris or Brahmans of Malabar. The ordinary derivation of the word Nambudri is one well versed in the Vedas or more literally "full of wisdom." Another derivation is from a Dravidian word meaning trust or confidence.

The advent of the Brahmans probably took place in the first three centuries of the Christian era. The Buddhist

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every year at least offerings are made to these gods through the medium of the Nambudri priests. * * * *

The serpent also plays a conspicuous part in contracts between citizens. The family-serpent is in old deeds the subject-matter of sale. The sale of a house-compound extends also to the family-serpent. The stipulation in these documents invariably is that the family-serpents are sold along with the properties; and even in cases of division of family property amongst its several branches of members, the family-serpent is included in the division. Such is the sacred prominence which has been given to the serpent amongst us. Their anger is said to manifest itself in some member of the family being struck down with leprosy or some other loathsome disease; while by their propitiation they can be converted into the guardian angels of our households, powerful enough to preserve the prosperity of the inmates as well as to vouchsafe their complete immunity from the attacks of virulent diseases and sometimes even from death." (Malabar and its Folk, by T. K. Gopal Panikkar, pp. 145—151.)

missionaries perhaps preceded the Brahmans (*a*). Kerala is one of the countries mentioned in the first edict of Asoka. But Buddhism never obtained a firm hold in Malabar, although according to tradition some of the Chera Kings favoured its introduction. Malabar was for centuries a stronghold of Brahmanism. Shut off by the long range of the Western Ghats from other centres of civilization, Malabar soon became a priest-ridden country.

The legendary history of Malabar composed by the Brahmans is a mass of anachronisms and inconsistencies. It is impossible to believe that the Brahmans ever acquired the sovereignty of the country or took to arms as a profession. In the sense in which, as Monier-Williams says, the government of all Muhammadan States practically resolves itself into a kind of theocracy of a pattern not unlike that of the Jews under Moses—that is to say, Muhammad and the King are joint rulers—there may have been a theocracy in Malabar. It is not so long ago that a Travancore king solemnly made over possession of all his dominions to his God, and similar acts may have found expression in the saying that the Brahmans and the King are joint rulers. In any other sense, the claim of the Brahmans to sovereignty seems to rest on very slender foundations.

The Brahmans appear to have been welcomed by the people of Malabar, though, on their first advent in

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(*a*) I am very doubtful if either Brahmans or Buddhists were to be found in Malabar at as early a date as that given by Mr. Wigram in the text. As to this Dr. Burnell writes "There is not much historical evidence to prove that there were Brahmans in Southern India before the seventh century A.D. and there is very little to indicate that there were Buddhists or Jains before that date" (Elements of South Indian Palæography, 2nd edition, p. 12). I do not believe that there are any good grounds for holding that Brahmans migrated to the Malabar coast four centuries before they appeared in Southern India.

Kolattanad it is probable that they conciliated the inhabitants by adopting the law of inheritance in the female line. It is not unreasonable to suppose that this condition was imposed on the Payyanur Gramam by the Kola King, as it was on the Tiyans and afterwards on the Mappillas who settled in his dominions.

The Brahmans founded their Gramams and their Devasams and soon began to exercise a powerful influence in the council chamber of the King. The Nayars willingly submitted their females to the embraces of the Brahmans, and the custom of securing Brahman husbands for the females of the Royal families and petty chieftains of Malabar continues to the present day. It is not too much to say that the intermingling of races has been most felicitous in producing a fine body of men and women. Subservience to the Brahmans has always been one of the chief characteristics of the Nayars, though they arrogate to themselves a position of relative superiority to all inferior castes.

At the present day, there are numerous subdivisions among the Brahmans of Malabar. Below the Nambudris are the Elayads, the Mussads and the Nambidis. Intermediate between the Brahman and the Nayar is a class of persons called Ambalavasis who are employed as Temple servants and known by the name of Varians, Pisharodis, Nambissans, etc.

Among the west coast Rajahs, there are some who claim to be of Kshattriya origin, and the Cochin Rajah has perhaps some foundation for his claim. It is almost certain that he rose to power on the extinction of the Chera dynasty. The Chirakkal Rajah (Kolatiri) and the Travancore Rajah, who is a branch of the same family, are representatives of the ancient Nayar Kings, perhaps the oldest aristocracy in the world. Similarly, the Walluvanad Rajah (Valluva Konatiri) is a representative of another ancient kingdom. The smaller Rajahs, if Kshattriyas, are

persons who rose to power in the ninth century ; if Nayars, are perhaps representatives of the families of old chieftains of the country. The Palghat Rajah admittedly belongs to an inferior caste of Nayars to which an hereditary taint is said to be attached.

The only indigenous people of Malabar who have not been mentioned are the Mukkuvans or fishermen of the coast, numbers of whom are converts to the faith of Islam.

Of the foreigners of Malabar it is unnecessary to say much. There are Tulu Brahmans (Embrantiris), Konkani Brahmans and Tamil Brahmans (Pattars). The last class are especially numerous in Palghat. There are artisans from the east coast with their subdivisions into guilds of carpenter, goldsmith, brazier, blacksmith and coppersmith. There are the inferior artisans, such as the washerman, the barber, the potter, etc. These complete the list of the so-called Hindus of the Province.

The native Christians may be divided into four classes, *viz.*, the Syrians, the Romo-Syrians, the Roman Catholics and the Protestants. The Syrian Church has been in existence from the early centuries of the Christian era. It acknowledged the supremacy of the Patriarch of Antioch. In the sixteenth century, A.D., most of these Churches became proselytes to the Church of Rome, but the coast Churches remained faithful to their allegiance. These proselytes form the sect of Romo-Syrians, who are governed either from Portugal or Rome. The Roman Catholics are, as a general rule, the descendants of the Portuguese families, who intermarried with the natives of the country, and the converts of the Portuguese and Latin Missions. Most of the Protestants are converts made by the Basel Missionaries. The bulk of the native Christians in Malabar belong to this sect, though in Calicut and other towns there is a considerable body of Roman Catholics and on the borders of Cochin a few Romo-Syrians. The bulk of the Romo-Syrians and the Syrians are to be found in Cochin and Travancore.

It only remains to speak of the Mappillas. Originally the descendants of Arab traders by the women of the country, they now form a powerful community. There appears to have been a large influx of Arab settlers into Malabar in the ninth century, A.D. (*a*), and the numbers have been constantly increased by proselytism. The Mappillas came prominently forward at the time of the Portuguese invasion at the end of the fifteenth century, A.D.

Malayalam is the language spoken along the Malabar coast on the western side of the ghats from Chandragiri River on the north near Mangalore (entering the sea in Lat. 12°29′), beyond which the language is for a limited distance Tulu and then Canarese, to Trevandrum on the South (Lat. 8°29′) where Tamil begins to supersede it. Tamil however also intertwines with Malayalam all along Malabar (*b*).

(*a*) As to this Dr. Burnell writes, "The Muhammadan Arabs appear to have settled first in Malabar about the beginning of the ninth century; there were heathen Arabs there long before that in consequence of the immense trade conducted by the Sabeans with India" (Elements of South Indian Palæography, 2nd edition, p. 57).

(*b*) Glossary by Yule and Burnell, 2nd edition, p. 456. Dr. A. C. Burnell adds:

"The term Malayalam properly applies to territory and not language and might be rendered 'Mountain Region'". Bishop Caldwell writes:—

"The difference between Malayalam and Tamil though originally slight has progressively increased so that the claims of Malayalam as it now stands to be considered not as a mere dialect of Tamil but as a sister language cannot be called in question. Originally, it is true, I consider it to have been not a sister of Tamil but a daughter. It may best be described as a much altered offshoot." (Caldwell's Dravidian Grammar, Introduction, p. 24.)

PART I.

THE FAMILY.

CHAPTER I.—PARTITION—INHERITANCE.

CHAPTER II.—ADOPTION.

CHAPTER III.—QUASI-MARRIAGE CUSTOMS—TALI-KATTU-KALYANAM—SAMBANDHAM.

CHAPTER IV.—RIGHTS AND OBLIGATIONS OF KARNAVANS.

CHAPTER V.—REMOVAL OF KARNAVAN.

CHAPTER VI.—ALIENATION BY KARNAVANS.

CHAPTER VII.—SEPARATE AND SELF-ACQUIRED PROPERTY.

PART I.

CHAPTER I.

PARTITION—INHERITANCE.

In the management and assignment of property, the customs of the Malabar Brahman (Nambudri) do not differ very widely from the customs of the Malabar Nayar. Impartibility is the rule prescribed and community of interest can only be severed by voluntary separation and partition. Nambudri Brahmans are governed by Hindu Law, modified by certain special customs, the greater portion of which they appear to have adopted since their settlement in Malabar. In order to maintain the rule of impartibility among the Nambudris, it is customary for the eldest only of several brothers to marry whilst the younger brothers are permitted to form temporary alliances with Nayar women. There is, however, no rule of law and no custom prohibiting the junior males from marrying. The offspring of these temporary alliances become members of the Nayar tarwads of their mothers. The main difference between the Nambudri and the Nayar is that the former, with the single exception of those belonging to the Payyanur Gramam in North Malabar, follow the Makkathayam (descent by sons) system of inheritance, whilst the Nayar follows Marumakkathayam (descent by nephews) system. Questions of inheritance can only arise

in the case of separate and self-acquired property. Those who are members of the same family are said to be connected by Mudal Sambandham (community of property), whilst those who were once of the same family and have separated from one another are said to be connected by Pula Sambandham (community of pollution). On failure of the former class who are termed Anandravans, the latter inherit and are termed Attaladakam heirs.

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(1) Impartibility is the rule prescribed and community of interest can only be severed by voluntary separation and partition.

In 1810, the Provincial Court of the Western Division held that the individual share of a member of a Marumakkathayam family was liable to be sold for debts contracted by him; that if partition was made, it must be *per stirpes* and not *per capita* and that the Karnavan was not entitled to a larger share than any of the other members. The Judges, in their circular Proceedings of 28th May 1810, say :—

" As this decision may possibly instigate the younger branches of the Nayar families to demand a partition of the property of the family to which they belong, it is necessary to observe that the Nambudris examined as above seem to admit with reluctance the possibility of the occurrence of any circumstances that should call for a partition of family property or any deviation from the immemorial usage in Malabar which vests in the senior male of each family, the management of the property in trust for the support and other expenses of the rest. Any application therefore for such division, or for any individual share, should be received with much circumspection and, no one, unless he be either the representative or a co-representative of a branch of the family, should be considered as entitled to demand such a partition."

In 1813, the same Provincial Court decided, in Ambu and Kelu *v.* Ramana Nambiar and Cannan, that the

Marumakkathayam law did not admit of a division of family property and this decision was confirmed by the Sudder Court. In this suit certain junior members of a Marumakkathayam tarwad sued the two senior members of the tarwad for their joint share of the family property as it stood when the defendants commenced to manage the property. The Provincial Court rejected the demand for a division of the family property, as inconsistent with the law of Marumakkathayam, but, as it was shown that one of the defendants, Ramanna, was incapable of management, while the other, Cannan, had been negligent, the Court removed Ramanna from management and directed that two of the plaintiffs together with Cannan should for the future jointly look after the family property. On appeal the Sudder Court having, called for further evidence as to the local usages of Malabar, decided that the judgment of the Provincial Court was in conformity with such usages and dismissed the appeal (*a*).

The following passage is extracted from an opinion given by the Sudder Court pundits on 19th January 1854:—

"Among the Brahmans of Malabar there is no occasion for the division of the family property. it being customary among them that the eldest brother alone should marry, that his younger brothers should remain unmarried, and that his descendants alone should perform their obsequies and become their heirs. If, however, a younger brother should marry, there can possibly be no reason why he should not be allowed the share of property he is entitled to by the Hindu Law, since his issue would be separate and distinct."

The latter part of the opinion is clearly erroneous.

In Ravee Vurma *v.* Meppas Amma Valia Amma, which was a suit for the division of family property belonging to a Marumakkathayam tarwad, the Principal Sudder Amin awarded the plaintiffs a share and this decision was

(*a*) A. S. 28 of 1814. 1 Sudder Decisions, 118.

confirmed on appeal by the Civil Judge of Tellicherry (*a*). The Sudder Court (Morehead and Goodwyn, JJ.), however, on special appeal, following the decision in Cheru Amma *v.* Ramana Nambiar and Cannan, reversed the decree of the Lower Courts and dismissed the suit (*b*).

In A. S. 219 of 1856 (Calicut), Mr. Cook, as Sub-Judge, says :—

"To constitute a valid division of the tarwad property, local usage demands that all the members of the tarwad are aware of and consent to the contemplated division." (Zillah Decisions, Calicut, 1856, p. 19.)

In A. S. 203 of 1855 (Tellicherry), Mr. Chatfield says :—

"The assertion of a division being opposed to Hindu Law where the rules of Marumakkathayam prevail is not true, as the heirs by mutual consent and agreement, as in the case here, have full authority to effect a partition of the family estate." (Zillah Decisions, January 1857, p. 15.)

In A. S. 36 of 1860 (Tellicherry), Mr. Holloway held that partition among Malabar Brahmans was wholly alien to the principles of the law which governed them.

In Munda Chetti *v.* Timmaju Hensu, the High Court (Frere and Holloway, JJ.) had before them a case from Canara in which the right of a female to division was set up. Mr. Justice Holloway, in delivering judgment, said :—

"It has not been disputed, as indeed it could not be, that the compulsory division of the family property is wholly opposed to the authorities upon which the Aliya Santana system of inheritance rests. It is equally opposed to the principle of that system which vests the property in the females of a family. This system of inheritance differs only from that of Malabar in more consistently carrying out the doctrine that all rights to property are derived from females. If this indisputable rule had been abrogated by decisions of the highest Court of appeal upon the question distinctly raised before it, how much soever I should have lamented that Judges had overstepped their

(*a*) Mr., afterwards Mr. Justice, Frere.

(*b*) S. A. 4 of 1857. Sudder Decisions, 1857, p. 120.

proper duty of declaring law, I should, as in the case of Hindu wills, have followed such decisions. Here, however, the only decisions produced are those of inferior Courts, evidently influenced by their views of expediency in the particular case before them, and still more singularly decisions in which, while violating the law, those Courts have admitted its existence. Decisions dividing family property have also been passed in Malabar, and it is one of the claims of our late colleague, Mr. Justice Strange, upon that respect which we all feel for him, that he successfully resisted the attempts of lower Courts, also acting upon their own views of expediency, to introduce foreign admixtures into a law of which, whatever may be thought of the policy, none can deny the consistency with the theory upon which it is based" (*a*).

Mr. Justice Holloway was here dealing with a case under the Aliya Santana law and doubts have been recently expressed by a writer in the Madras Law Journal as to whether the view taken by the Courts that there can be no division in a Marumakkathayam tarwad except with the consent of all the members is in entire accordance with Marumakkathayam usage. In the article referred to it is observed:—

"But we must admit that, so far as Malabar is concerned, the law of impartibility has been laid down by the highest Court ever since the year 1814, and this is the view upon which the Marumakkathayam people have acted for a long time. There has been no express decision during recent years on the question. But this is no doubt due to the fact that no one has thought it worth while raising the question and the people have acquiesced in the law as laid down by the Courts" (*b*).

(*a*) 1 Madras H. C. Rep., 380.

(*b*) Madras Law Journal, Vol. IX, pp. 145 and 146.

Mr. Mayne's remarks as to this, in the preface to the first edition of his Hindu Law are well known, but their truth and importance justify their being quoted again. He says:—

"Even in Malabar I have witnessed continued efforts on the part of the natives to cast off their own customs and to deal with their property by partition, alienation and devise, as if it were governed by the ordinary

If the question was one that in reality admitted of argument it is certain that there must have been in recent years a great many junior members of tarwads to whom it would have been well worth while to bring the matter before the Courts for decision (*a*). In Vasudevan *v.*

Hindu Law. These efforts were constantly successful in the Provincial Courts, but were invariably foiled on appeal to the Sudder Court at Madras, the objection being frequently taken for the first time by an English barrister. It so happened that during the whole time of this silent revolt the Sudder Court possessed one or more Judges, who were thoroughly acquainted with Malabar customs, and by whom cases from that district were invariably heard. Had the Court been without such special experience, the process would probably have gone on with such rapidity, that by this time every Malabar tarwad would have been broken up. The revolt would have been a revolution" (Preface, p. XIII). And again in the body of the work :—"It is certain that the Malabar tarwads would long since have broken up into families, each headed by a male, if our Courts had allowed them to do so" (6th edition, p. 293).

(*a*) In a little book on Malabar customs recently published by a Nayar the writer, although most anxious for radical changes in the existing tarwad system, does not attempt to controvert the proposition that family property cannot be divided unless all the members of the tarwad agree (Malabar and its Folk, by T. K. Gopal Panikkar, p. 48). As to what the law is regarding this matter there can be no doubt but it becomes every day more and more a question for consideration as to whether the time has not come for the Legislature to step in and afford the members of Malabar tarwads greater facilities for bringing about a division of the family property. In a suit (Palamoli Chaliyatat Rarappuni Nayar *v.* Palamoli Chaliyatat Chennan Nayar and others) to remove a Karnavan which recently came before the High Court, it was shown that there were two hundred members of the tarwad who lived in thirty separate houses. The Karnavan whom the Courts were asked to remove was a man of seventy-seven years of age who had not succeeded to his office till he was almost seventy. The affairs of the tarwad were in great confusion, endless suits being from time to time filed against the Karnavan by the rival branches for maintenance. It was scarcely possible that any Karnavan could restore order to the chaos shown to exist, but as all the members would not agree to division all the Courts could do was to remove the worn-out old man of seventy-seven and put a man of sixty-three in his place. In the case of over-grown tarwads, such as this, where there has been endless litigation and internecine conflicts for years between the several Tavalis, compulsory partition by a Court decree is clearly the only remedy (A. S. 50 of 1901. Benson and Moore, JJ.).

the Secretary of State for India, the High Court (Collins, C.J., and Muttuswami Aiyar, J.) point out, as if it was a matter regarding which there could be no doubt, that among Nambudris, as among Nayars, family property is not liable to be divided at the instance of any one of the coparceners (*a*), and Mr. Mayne in his work on Hindu Law expresses the same opinion without hesitation, observing as follows :—

"In Malabar and Canara, at the present day, no right of partition exists. In some cases, where the family has become very numerous, and owns property in different districts, the different branches have split into distinct tarwads, and become permanently separated in estate. But this can only be done by common consent. No one member, nor even all but one, can enforce a division upon any who object" (*b*).

Difficult questions not infrequently arise as to whether, when a tarwad has for many years been separated into branches, community of property (Mudal Sambantham) as well as community of pollution (Pula Sambantham) still exists between them. The subject is dealt with in Erambapalli Korapen Nayar *v.* Erambapalli Chennen Nayar (*c*). The plaintiffs sought for a declaration that they were mem-

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(*a*) I. L. R., XI Madras, 157.

(*b*) Mayne's Hindu Law, Sixth Edition, p. 301. Mr. Mayne points out that the system now in force in a Malabar tarwad is no doubt the same as that which was generally prevalent among Hindus as long as the family retained its antique Patriarchal form. He writes :—

"It was by very slow steps that the right to a partition reached its present form. At first it is possible that a member, who insisted on leaving the family for his own purposes, went out with only a nominal share, or such an amount as the other members were willing to part with. This is the more probable, since, so long as the family retained its Patriarchal form, the son could certainly not have compelled his father to give him a share at all, or any larger portion than he chose. The doctrine that property was by birth—in the sense that each son was the equal of his father—had then no existence. The son was a mere appendage to his father, and had no rights of property as opposed to him. The family was then in the same condition as a Malabar tarwad is now" (Hindu Law, 6th Edition, pp. 302, 303).

(*c*) VI Madras H. C., 411.

bers of the tarwad of the defendants. The defendants contended that, though descended from a common stock, their tarwad and that of the plaintiffs were distinct. The Civil Judge (Mr. Carr) found in favour of the plaintiffs, but, on appeal, certain issues were referred for trial and Mr. Sharpe found that no community of interest existed between the plaintiffs and the defendants, or, in other words, that they belonged to different tavalis possessing a right to the separate enjoyment of property.

The High Court (Holloway and Innes, JJ.) upheld Mr. Sharpe's findings. In his judgment, Mr. Holloway said:—

"As in all Hindu Law, so in the archaic form of it which exists in Malabar, the first conception of a family is of an indissoluble unit, a mere aggregate with no separate rights, living under one head, united more especially by their connexion with the same *sacra*. In Malabar, as elsewhere, the inconvenience of this state of things has made itself felt and families, becoming very numerous, have split into various branches, have in fact become new families."

"The common speech of the people is the best evidence of customary law and when they speak out of Courts of justice they are often truthful enough. Every man who has conversed much with Malayalis must have heard the very common expression in answer to the question—Is such a man of your tarwad? There is community of purity and impurity between us, but no community of property. In one sense of the word, people so related are still of the same tarwad. In the only sense with which Courts of justice are concerned, they are not. Where there are several houses bearing the same original tarwad name, but with an addition, and there is no evidence of the passing of a member of one house to another, there is the strongest possible ground for concluding that separation has taken place."

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"It seems to me that the evidence shows precisely the case of severance which I have described. One of the several branches having become better off than another, that other, by virtue of the ambiguity of a word, is seeking to reap that which it has never sown and to which, on the true understand-

ing of the customs of the people, it is wholly unentitled. I would declare that the plaintiffs and defendants were originally of the same tarwad, but that there has ceased to be community of rights of property between them."

In a case that came before him Mr. Wigram held that separation for two generations, that is for sixty years, was good presumptive evidence of a division (*a*). He was further of opinion that complete separation for one generation, that is for thirty years, would be sufficient to throw the burden of proof on those who alleged community of interest.

In A. S. 78 of 1878 (North Malabar), the Sub-Judge held that forty years' separation was sufficient, and his decree was affirmed by the High Court.

Further, it appears to be the rule that persons claiming membership in a tarwad in which they are not residing, must prove that they are descendants of the mother, grand-mother, or great grand-mother of some of the existing members (*b*).

(*a*) A. S. 15 of 1879.

(*b*) It may be noted here that it has been held, in Panga *v.* Unnikutti following Krishnan Nambiar *v.* Chathu Nambiar (A. S. 135 of 1885), that the value of a suit to have it declared that certain persons are or are not members of a tarwad is the value of the share of the tarwad property which would be allotted to them if a partition were made by common consent (Subramania Aiyar and Benson, JJ., I. L. R., XXIV Madras, 275).

This decision has been followed in the following rule which has recently been framed by the High Court as to the valuation of a suit brought by a member of a Malabar tarwad to enforce his rights as such :—

"The subject-matter of a suit for the enforcement of a person's right as a member of a tarwad governed by the Marumakkathayam or Aliya Santana system of law or of a Nambudri illam, shall, for purposes of the Court Fees Act, 1870 and the Suits Valuation Act, 1887, be valued at the amount at which, if the whole of the tarwad or illam property were by the consent of all equally divided among all the members (including the plaintiff) of the tarwad or illam, the plaintiff's share would be valued, with reference to the valuation of the suit under the Court Fees Act, 1870, if the suit were one brought by a stranger for the recovery of the whole property—moveable and immoveable—possessed by the tarwad or illam." (Notification of the 26th February, 1903, *vide* Fort St. George *Gazette* of 3rd March 1903, Part II., p. 368.)

(2) Nambudri Brahmans are governed by Hindu Law modified by certain special customs, the greater portion of which they appear to have adopted since their settlement in Malabar. In order to maintain the rule of impartibility among the Nambudris, it is customary for the eldest only of several brothers to marry, whilst the younger brothers are permitted to form temporary alliances with Nayar women. There is however no rule of law and no custom prohibiting the junior members from marrying. The offspring of these temporary alliances become members of the Nayar tarwad of their mothers. The main difference between the Nambudri and the Nayar is that the former, with the single exception of those belonging to the Payyanur Gramam in North Malabar (*a*), follow the Makkathayam (descent by sons) system of inheritance, whilst the Nayar follows the Marumakkathayam (descent by nephews) system.

On the question as to the extent to which the usages of Nambudris differ from those of Brahmans in other provinces Mr. DeRozario, who was employed as a Sub-Judge for many years on the West Coast, on an issue having been sent down to him by the High Court, in Eranjoli Illath Vishnu Nambudri *v.* Eranjoli Illath Krishnan Nambudri, as to whether the adoption by a Nambudri of a sister's son was a practice sanctioned by long usage, observed as follows :—

"The usages of Nambudris differ from those of Brahmans in other provinces. They have, during centuries of isolation in Malabar, adopted customs and usages at variance with the general principles of Hindu Law. I shall specify the prominent variations :—

'(1) The eldest brother is alone permitted to marry, the junior brothers being allowed to consort with Sudra females.'

(*a*) Mr. F. Fawcett remarks in his "Notes on some of the people in Malabar" that seventeen Nambudri families of Payyanur in North Malabar follow the Marumakkathayam system of inheritance. The members of these families are looked down on by the other Nambudris who will neither intermarry nor eat with them. It is supposed that they are not of pure Brahman descent. (Madras Government Museum Bulletin, Volume III, No. 1, p. 47.) As to these families, Messrs. West and Bühler observe: "They are probably a race of mixed origin or who have assumed a higher caste than they are entitled to as it is virtually impossible that Brahmans with indissoluble marriage and known paternity should adopt the Nayar law of succession (Digest of Hindu Law, Third Edition, p. 284, note).

'(2) A girl attaining puberty without having contracted marriage does not forfeit her caste' (*a*).

'(3) Marriage may take place before as well as after a girl has attained puberty.'

'(4) Marriage takes place not immediately but after two years after the completion of the stage of studentship marked by the performance of the ceremony of Samavarttana.'

'(5) A boy on whom the ceremony of Upanayana, or investiture with the thread has been performed, may be adopted.'

'(6) Division cannot be enforced.'

'I can see no ground for saying that the adoption by Nambudris of a sister's son is not a practice, like the other practices sanctioned by long usage'" (*b*).

In Vasudevan *v.* The Secretary of State for India the question as to what law should be applied to Nambudri Brahmans was very fully considered and it was held that they were governed by Hindu Law modified by special customs which they had adopted since their settlement in Malabar and the High Court (Collins, C.J., and Muttuswami Aiyar, J.) observed as follows:—

"Although it was urged in appeal that Nambudris do not follow Hindu Law, the contention was ultimately not seriously pressed upon us. As the question is, however, one of general importance, and as the decision of several other issues in this case depends upon its determination, we may add that in our opinion the Judge has come to a correct conclusion. According to the evidence on both sides, succession is traced among Nambudris through males, and property passes from father to son, whereas, among Nayars, succession is traced through females and property descends from mother to daughter.

(*a*) As to this Mr. F. Fawcett remarks in his notes, to which reference has already been made, that infant-marriage is unknown among the Nambudris and that marriages are always celebrated after puberty. (Madras Government Museum Bulletin, Volume III., No. 1, p. 61.)

This fact is of importance as tending to show that the Nambudris migrated to Malabar before the system of child-marriage had been introduced among the Brahmans from whom they separated.

(*b*) I. L. R., VII Madras, 3.

Thus, the mode of tracing succession and the devolution of property are in accordance with Hindu Law and contrary to Marumakkathayam usage. Again, legal marriage is the basis of the Law of Succession among Nambudris as among Brahmans of the East Coast, whilst, among Nayars, there is no recognised connection between marriage and inheritance. Thus, the notion of paternal relation founded upon legal marriage as the cause of inheritance obtains both under Hindu Law and among Nambudri Brahmans. Further, a Nambudri woman, in common with a Brahman on this side of the ghats, takes her husband's gotram upon her marriage and passes into his family from that of her father; and perpetual widowhood and incapacity to re-marry on her husband's death are the incidents of marriage both among Nambudris and Brahmans of the East Coast. But among Nayars, a woman continues through life to belong to the family in which she is born, and the sexual relation which she forms, or her so-called marriage, operates in law neither to give her the domicile of her husband nor to create a disability in her either to re-marry or to put an end to her marriage at her pleasure during her first husband's life. Moreover, the same rule of collateral succession obtains both among Nambudri Brahmans and other Brahmans in Southern India. Among the former dayadis, or distant kinsmen, are divided into those who have ten and three days impurity or pollution, and, among the latter, such kinsmen are classified as gotraja sapindas and samanodakas, the sapinda and samanodaka relationship being severally the cause of ten and three days' impurity or pollution, arising from the birth or death of any one so related. Moreover, Nambudris and Brahmans on the East Coast recognise alike the authority of the Vedas and Smritis, and they have faith in the religious efficacy of ceremonial observances and of funeral and annual obsequies. We may also refer to the ceremony of investiture or upanayana and to the notion of second birth as common to both. The view, therefore, that when Nambudris settled in Malabar they carried their personal law with them, though they changed it in some respects after their settlement on the West Coast, is supported not only by the foregoing facts, but also by the fact that gotrams of Nambudri Brahmans are said to be the same as

those of Brahmans on the East Coast indicating thereby common descent from the same original male ancestors."

"There is, therefore, sufficient foundation for the opinion of the Judge that Nambudris are governed *primâ facie* by Hindu Law; but it must be remembered that the personal law which they presumably carried with them was the Hindu Law as received by Brahmans at the time of their settlement in Malabar, and that it is not the Hindu Law as modified by customs which have since come into prevalence among Brahmans on the East Coast. For instance, the form of marriage called the Sarvasvadanam marriage, which is referable to the ancient Hindu Law of putrika putra or of the appointed daughter and her son, is still in force among Nambudris as a mode of affiliation, though it is obsolete on this Coast."

"Another qualification with which Hindu Law should be applied to Nambudris consists in their adoption of the territorial law or the usage of Nayars in several respects subsequent to their settlement in Malabar. Under Hindu Law, both ancient and modern, partibility is an incident of ordinary Hindu property, coparcenary depending for its continuance upon the mutual consent of co-sharers; but among Nambudris, as among Nayars, family property is not liable to be divided at the instance of any one of the coparceners. Again, self-acquired property merges, on the death of the person acquiring it, into family property as is the case among Nayars. It appears further that the senior male, in point of age, is entitled to management in preference to the representative of the senior branch. We may also mention that among Nambudris the eldest brother alone usually marries, and the others, as is the case among Nayars, consort with Nayar women otherwise than with the sanction of marriage. Having regard to the evidence on both sides, the conclusion we come to is that Nambudris are governed by Hindu Law, except in so far as it is shown to have been modified by usage or custom having the force of law, the probable origin of the special usage being either some doctrine of Hindu Law as it stood at the date of the settlement, though now obsolete, or some Marumakkathayam usage."

* * * * *

"The Judge speaks apparently of the modern Hindu Law as received by Brahmans on this side of the Western Ghats as the personal law which the Nambudris, took with them when they settled in Malabar. As to the probable period of their settlement in Malabar we have no precise information; but the well-known usages of Nambudris, purporting to be derived from Hindu Law and to rest on Smritis, disclose considerable divergence from the doctrines of Hindu Law now received on the East Coast. Sarvasvadanam marriage is traced by Nambudris to Hindu Law, and the text of Vasishta, which is adopted as the formula to be solemnly pronounced during the marriage, discloses a connection between this usage and the ancient Smriti Law. But this form of marriage is unknown on the East Coast, nor is it recognised as a mode of affiliation. Again, a Brahman woman becomes an outcaste on the East Coast by not marrying at all, or by marriage after she attains her maturity, but in Nambudri illams women marry after they attain their maturity, and some never marry at all. Further, the adoption of a son as the son of two fathers or in the dwayamushyayana form is obsolete on this Coast, and, according to the evidence takes on Commission in Travancore and Cochin, it is the ordinary form of adoption recognised in Malabar. Further, on the East Coast, no Hindu widow is competent to adopt in the absence of express authority either from her husband or his sapindas; but, according to the evidence taken in Travancore, the Nambudri widow has an implied authority to adopt in the absence of express prohibition.*** It is therefore important to bear in mind that the Hindu Law applicable to Nambudris was as it existed at the time of their settlement in Malabar. The appellant claimed in this case, as already remarked, three special powers for a Nambudri female, or an antarjanam, as she is commonly designated, and the first of those powers is a power to alienate inherited property at her pleasure. The Judge finds that the custom urged in its support is not made out by the evidence on the record, and we see no sufficient reason to come to a different conclusion."

* * * * *

"According to Nayar usage women have no doubt full ownership when they are the sole members of their tarwads;

but the system of law under which they have such ownership is essentially distinct from Hindu Law. The status and usage of Nambudri women in other respects are anything but similar to those of Nayar females. The restriction on the disposing power of a Hindu widow is the outcome of her status as widow and the austere life prescribed for her by her religion and of the text that Hindu property was designed for religious sacrifices and spiritual purposes. The religion and status of Nambudri widows are substantially the same, whilst widowhood and its peculiar religious obligations in the form in which they are recognised among Nambudris are wholly unknown to Nayars. It is, therefore, antecedently improbable that Nambudri women should have adopted Nayar usage in respect of the power of disposition only, notwithstanding their custom as to widowhood and its religious obligations" (*a*).

The head note to a reported decision (Nilakandan *v.* Madhavan) of the Madras High Court is as follows:—"The principle of Hindu Law, which imposes a duty on a son to pay his father's debt, contracted for purposes neither illegal nor immoral, is not applicable to the Malabar Brahmans called Nambudris" (*b*).

A reference to the judgment will, however, show that the High Court, as a matter of fact, decided nothing in this case. The High Court called for a finding from the Sub-Judge of Calicut and, as that finding was in favour of the respondents and no objection had been taken to it, dismissed the Second Appeal that had been preferred to them without giving any opinion as to the important question of law involved in the case. The decision was one which, in my opinion, should not have been reported (*c*).

(*a*) I. L. R., XI Madras, 157.

(*b*) I. L. R., X Madras, 9.

(*c*) The following comments on this decision by a writer in a paper published in the Madras Law Journal may be noted:—

"In Nilakandan *v.* Madhavan, Brandt and Parker, JJ. held that the rule of Hindu Law, according to which the son is bound to pay the debts of the father, is not applicable to the Nambudris. The judgment, however, is based entirely on the finding of the Subordinate Judge of Calicut

In P. Pappi Antarjanam *v.* Teyyan Nayar the question as to whether there was any law or any custom having the force of law which prohibited the junior members of a Nambudri illam from marrying was recently decided in the negative by the High Court (Subramaniya Ayyar and Moore, JJ.) in the folllowing decision:

"The first issue raises a question of considerable importance. It runs " Whether junior members of Nambudri illams are prohibited by law or custom from contracting valid marriages in their own community"? The District Munsif has decided this question in the affirmative, but the Subordinate Judge has taken the opposite view and held that such marriages are prohibited. He bases his decision mainly on two judgments, one of Mr. Wigram, who was for some years District Judge of South Malabar, and the other of Mr. T. R. Raman Nayar, a Subordinate Judge employed in Malabar.

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that the rule in question was not applicable. No objection was raised to the finding, and the High Court accepted the finding. It may moreover be doubted whether the point really arose in the case. A decree for the specific performance of a contract was passed against a Nambudri. He died after the decree and the execution of the decree was resisted by his widow and his two minor sons, the widow acting as their guardian. The decree-holder's petition to remove the obstruction was registered as a suit. The Munsif found that the debt was binding on the sons, having been incurred for the benefit of the family, but, instead of passing a decree for possession, gave a decree for the debt for the discharge of which the agreement to sell was entered into and in default for the sale of the house. The Appellate Court reversed the decree on the ground that the debt was not binding on the defendants. In Second Appeal it was contended that the defendants could not dispute the binding nature of the debt unless they proved that it was illegal or immoral. The High Court called for a finding on the question whether the law applicable was the ordinary Hindu Law or the Marumakkathayam Law or a combination of both, and, if the last, in what respect the law as affecting the liability of the defendants differed from the ordinary Hindu Law. The Sub-Judge found that it had not been proved that the law compelling the son to discharge all debts of the father which are not illegal or immoral was binding on the Nambudris. Now the question raised would not decide the liability of the widow who was one of the defendants in the suit. The High Court itself did not decide " as a matter of law or usage," that the rule in question did not apply to the Nambudris." (Madras Law Journal, Vol. 12, pp. 183, 184.)

Mr. Wigram's judgment is dated the 14th December 1876 and was delivered in Second Appeal No. 562 of 1876. In it he observes that "it is difficult to see how the 2nd defendant, who is the wife of Narayanan Nambudri's younger brother who predeceased him, can have any status social or otherwise in a Nambudri family where only the oldest male member may marry." This no doubt reads as if Mr. Wigram was prepared to hold that the marriage of a junior male in a Nambudri illam was illegal. At the time that this judgment was pronounced Mr. Wigram, however, had been only a year in Malabar and when some six years later he published his Malabar Law and Custom he expressed himself, as we believe, more accurately as follows:—"In order to maintain the rule of impartibility among the Brahmans it is customary for the oldest only of several brothers to marry whilst the younger brothers are permitted to form temporary alliances with Sudra women" (*a*). This is we believe, the correct view to take of this question. There is no law prohibiting these marriages, but a custom has sprung up under which the junior males do not as a rule marry. Mr. Raman Nayar's judgment was passed in 1874 (*b*). The plaintiffs in that suit contended that a junior male in a Nambudri family could not contract a valid marriage and based their case on Section 383 of Mr. Justice T. L. Strange's Manual of Hindu Law. The defendants produced no evidence on the point and the Subordinate Judge accordingly decided in favour of the plaintiffs. It does not appear to us that much importance can be attached to the decision. The Subordinate Judge quotes Mr. Justice Strange as laying down that "the law which governs the Nambudri families does not under any circumstances permit a junior Nambudri to contract a valid marriage." This is a much more positive statement than is to be found in Mr. Justice Strange's Manual. All that he really says is that the origin of Marumakkathayam is conceived to have been thus: "It is alleged that Parasoorama, the first King of Malabar, introduced Brahmans into the District and gave them possessions therein and to prevent these properties from being split up decreed that

(*a*) Wigram's Malabar Law and Custom, First Edition, p. 3.

(*b*) O. S. 35 of 1873, Sub-Court, Calicut.

they should vest in the older brothers whom alone he permitted to contract marriage. The sons of these were to be accounted as sons for the whole family. The junior brothers being without wives were allowed to consort with females of lower castes" (*a*). All that this really amounts to is that Mr. Justice Strange observes that in Malabar there is a custom by which the junior males in a Nambudri illam do not marry, and then proceeds to give the mythological explanation of the custom. That Mr. Justice Strange attached the slightest weight to this myth which, it may be remarked, is absolutely without historical foundation, there are no grounds for supposing. It is thus evident that the judgment of the Subordinate Judge of Palghat now under consideration is based on very scanty material.

The Subordinate Judge observes that he has not been referred to a single decision of the High Court wherein the marriage of an Anandravan in a Nambudri family has been held to be valid and, when the argument was advanced that evidence had been produced before the District Munsif of several cases in which junior male members of illams had contracted marriages, met the argument as follows: "I am of opinion that the law should be administered as it is and not according to any practice amongst Nambudris which must have been of recent origin. Be that as it may there is no legislative or judicial sanction of the marriage of a younger brother in a Nambudri family." The Subordinate Judge has here, in our opinion, improperly imposed on the plaintiff the onus of proving that the marriage of a junior in an illam is legal. Brahmans are to be found all over India and everywhere they are in the habit of contracting valid marriages with females of their own caste. Even in Malabar it has never been questioned that the senior males, at all events, in an illam can marry. Such being the case the onus of proving that certain members of certain Brahman families cannot enter into a legal marriage contract is clearly on the person who advances such a proposition, opposed as it is to the law and custom prevailing among members of the caste all over India. The defendants have certainly not discharged this onus. All that they have shown is that in

(*a*) Strange's Manual of Hindu Law, Second Edition, pp. 94, 95.

order to maintain the rule of impartibility prevailing among Nambudris a custom has sprung up under which junior males do not usually marry, but the evidence proves that that custom is not invariably followed and we are decidedly of opinion that we should not be justified in holding that such an ancient, continued and uniform custom of junior males in an illam not marrying has been shown to exist as could be held to deprive them of the right which, as members of the Brahman caste, they would ordinarily have of contracting a valid marriage with one of their own caste.

We accordingly hold on the first issue that junior members of Nambudri illams are not prohibited by law or custom from contracting valid marriages in their own community" (*a*).

(3) Questions of inheritance can only arise in the case of separate and self-acquired property.

When one member of a family separates from the tarwad and receives his share of the common property, he thereby forfeits all rights to the property so long as a single member of the tarwad survives. This was laid down by the Provincial Court of the Western Division in O. S. 24 of 1825.

In A. S. 285 of 1855 (Calicut), which was a suit brought to set aside the sale of a paramba, it was found as a fact that the alienor was the last member of his tarwad, and that he had an absolute power of alienation which could not be called in question by a Dayadi. Mr. Holloway, as Sub-Judge, says:—

"Mere collateral relations may succeed to property unalienated, but their non-consent will be no bar to 'alienation' (Zillah Decisions, 1857, p. 6). And the same principle was affirmed in A. S. 305 of 1855 (Calicut) by the same Judge" (Zillah Decisions, 1857, p. 18).

In Kunni Kannan Nayar *v.* The Collector of Malabar it was held by the Civil Judge of Tellicherry (Mr. J. W. Reid) in a decision which on appeal was confirmed by the High Court (Morgan, C.J., and Holloway, J.) that mere

(*a*) S. A. 1128 of 1900.

similarity of name was no evidence *per se* of a right of inheritance (*a*).

In Mukalakel Ahmed Hazi *v.* Mukalakel Koyatti (*b*) and also in Kunni Ramen *v.* Ramen Nambiar (*c*) the Principal Sudder Amin of Tellicherry (K. R. Krishna Menon) distinguished between the two classes of heirs, those who claimed as descendants of the mother, grandmother and great-grandmother of a deceased person, and those who claimed from more remote female ascendants. He apparently treated the first class as Anandravans, and the second class as Attaladakam heirs or Dayadis, but the solution of this question would of course depend on whether the members were or were not separated in interest.

The Karnavan of a tarwad takes by inheritance on behalf of himself and the other members of the tarwad to which he belongs.

(*a*) R. A. 120 of 1872 (H. C.).

(*b*) S. A. 344 of 1871 (H. C.). The parties to this case were Mappillas who followed Marumakkathayam.

(*c*) O. S. 19 of 1872, A. S. 69 of 1873 and S. A. 290 of 1874 (H. C.).

CHAPTER II.

ADOPTION.

There are said to be three kinds of adoption in use in Malabar :—

(1) Adoption by ten hands, *i.e.*, by the hands of the adoptors (male and female), the adoptee, and the adoptee's parents or guardians. In the case of those following the Marumakkathayam system of inheritance, the adoptors will be the Karnavan and the senior female in the tarwad, whilst the adoptee's guardians will be his Karnavan and mother. This form of adoption is very rarely used except in Brahman families, and the boy selected is usually one on whom the Upanayana ceremony has not been performed. It is probably almost identical with the ordinary Hindu adoption.

(2) Adoption by Chamatta, *i.e.*, by burning a pan of a sacred grass.

(3) Adoption by taking into the family.

The last is the form commonly adopted by Brahman widows and Nayars for the purpose of perpetuating the family when it is in danger of becoming extinct. There is no limit as to age or number of persons adopted. The only limit seems to be that the person or persons adopted should be of the same Vamsham or tribe as the adoptor. Among Nayars the adoption may be of either males or females. Sometimes a whole family of adults is adopted.

The Karnavan of a Nayar tarwad cannot adopt strangers into the family so as to make them and their descendants heirs to its property without the consent of the other members.

Whatever religious motive may be attached to the first two modes of adoption, the third mode appears to be based on entirely secular motives, and to be closely akin to the Kritima form of adoption, which is still in force in the Mithila country (*a*).

In selecting an heir for adoption, preference should be given to the distant kindred; but it is doubtful whether this is more than a moral precept. Notice should also be given to the Ruling power. Whether the Ruling power might, in the case of a person whose property would escheat for want of heirs, place a veto on the adoption is a question which has never yet been decided.

Among the Brahmans, there is another form of perpetuating the family by the affiliation of the son-in-law, which is called Sarvasadanam. The son-in-law succeeds to the management in trust for the issue of his marriage. If there is no issue, the property reverts to the nearest heirs. This custom seems to be a relic of the Putrikaputra or son of the adopted daughter and to recall a period when the daughter and the daughter's son were not in the line of heirs.

There is in the earlier reports an almost complete absence of mention of cases of adoption among Nayars.

(*a*) Mayne's Hindu Law, Sixth Edition, pp. 258 to 260.

In 1808, the Provincial Court of the Western Division upheld the adoption of two females and a male in a Nayar family, and decided that the adoptees were entitled to be maintained in the adoptor's family and this decision was confirmed by the Sudder Court.

Again in A. S. 21 of 1814, the Provincial Court upheld the adoption of a single female who stood in a considerably more distant degree of consanguinity as heir than others. Yet in A. S. 236 of 1858 (Tellicherry), Mr. Holloway speaks of "the singular and unheard-of process of Nayar adoption," and again in A. S. 183 of 1861 (Tellicherry) the same Judge speaks of the "ludicrous absurdity of adopting a nephew."

In A. S. 233 of 1862 (Tellicherry), Mr. Sullivan held that adoption must be of a female and not of a male, but in Edakandi Amni *v.* Kavilambara Thangal Kanaren Mr. Logan as District Judge upheld the adoption of a male and female, and his decision was confirmed by the High Court (*a*). Again in A. S. 69 of 1873 (North Malabar), Mr. Reid upheld the adoption of one male and four females, but his decision was reversed by the High Court on the ground that a declaratory suit would not lie.

In A. S. 75 of 1872 (North Malabar), the Sub-Judge, Krishna Menon, held that the adoptees should be selected from among the Attaladakkam heirs, but that this was rather a moral precept than a legal obligation and that selection of a stranger was not invalid. He, however, laid down that in the latter case (and apparently in the latter case only) the adoption must be made before the girl's marriage, and that her mother might be adopted at the same time. It is doubtful if these rulings rest on any good authority.

All the above quoted cases were from North Malabar, and Mr. Wigram, in the first edition of this book, expressed

(*a*) S. A. 19 of 1874, H. C.

the opinion that it was very rarely that any case of the kind arose in South Malabar. It will be remarked, however, that the important case which came before the Privy Council in 1900 was from South Malabar (*a*).

It may with confidence be asserted that the system of Nayar adoption is consistent with the usage of Malabar. The family of the Travancore Rajah would long ago have become extinct, but for the adoption of females to perpetuate the succession.

In the case of Nayars an adoption would naturally be carried out by the Karnavan on behalf of the tarwad. The question, however, as to whether the Karnavan has sole authority in the matter or whether the consent of all, or at all events of the majority, of the members of the tarwad is not necessary has been very fully considered in a recent case. There the members of a South Malabar Marumakkathayam tarwad were reduced to two, the Karnavan and his younger brother, and the Karnavan, without the consent of his brother, adopted his own son and daughter and also the children of the latter. The younger brother sued for a declaration that the adoptions were invalid and the High Court (Subramania Ayyar and Davies, JJ.) gave him a decree as prayed for (*b*). In his judgment Mr. Justice Subramania Ayyar quoted the following observation in Mr. Justice Strange's Hindu Law:—"On the failure of the sister's progeny, male and female, the head of the family may make adoption" (*c*); but pointed out that it could not be held that the author meant anything more than that when a tarwad finds it

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(*a*) Thiruthipalli Raman Menon *v.* Variangattil Palisseri Raman Menon, L. R., XXVII, I. A., 231. S. C. I. L. R., XXIV Madras, 73.

(*b*) I. L. R., XX Madras, 51.

(*c*) Strange's Hindu Law, Chapter XIII ("Malabar Law"), S. 403 (Second Edition, 1863). Mr. Strange adds:—"The descent being in the female line, the adoption must be of a female." This rule is not followed by the Courts.

necessary to make an adoption it acts through its chief member, the Karnavan. He then added as follows :—

"How then does the matter stand on principle? No doubt a Karnavan possesses, under the law, large powers with reference to the concerns of his tarwad. He is by birth the head of the family, holds possession of its property, receives the income and distributes the same according to his own discretion among those under his protection. And no doubt, in transactions with outsiders as well as in litigation with such persons, he generally represents the family. But it does not follow that he possesses similar independent authority with reference to adoptions into the family. For the powers just above referred to are obviously all more or less connected with management only; whereas adoption, on the other hand, is an act which clearly falls outside the scope of mere management. Such affiliation involves bringing in strangers into a tarwad and the exercise of the power so to affect its very constitution is *primá facie* not a matter to be entrusted to any one member, however prominent the position he occupies in that body is. Here it may be asked, is not a similar power vested in a father of a Hindu family to whom a Karnavan has been compared? * * *

"It is true that such a father has full authority to sanction the introduction of a stranger into the family by empowering a widow of one of his sons to make an adoption to her husband. But that exceptional power of the father rests upon a special provision of the Hindu Law So far, therefore, as the present question goes, there appears to be no analogy between the father and the Karnavan Moreover, considering that, unlike under the Hindu Law, a practically unlimited number of persons of both sexes can be adopted under the Marumakkathayam system, it is scarcely necessary to point out that the power in question, if it were exercisable by a Karnavan alone, is, should he happen to be an unscrupulous man, capable of being used by him with impunity so as to cause serious detriment to the other members of his tarwad.

"In these circumstances, with every desire not to weaken the established authority of a Karnavan, one cannot, especially when called upon to lay down almost for the first time a

definite rule on the subject, ignore altogether the inexpediency of recognizing that a Karnavan by himself is entitled to adopt; since that would only add one fresh ground for discord and dissension between a Karnavan and those subject to his authority, of which the constant conflict of the former's interest with his duty * * * is a fruitful cause, and which are said to be so rife in many families in different parts of Malabar."

He accordingly held that the adoptions were invalid and in this view Davies, J., concurred.

On appeal to the Judicial Committee of the Privy Council their Lordships laid down the law as follows: —

"The litigation is between Nayars in South Malabar, and has to be decided according to the laws and usages of those persons. Those laws and usages are very peculiar; some of them are so well established as to be judicially noticed without proof. But others of them are still in that stage in which proof of them is required before they can be judicially recognized and enforced. The Nayars are persons amongst whom polyandry is legally recognized; and descent of property through females is acknowledged law. A right (and perhaps duty) to adopt females into the familyor tarwad when necessary to preserve it appears also to be in accordance with their law. Speaking generally, it may be safe to say that this right is vested in the Karnavan or head of the family. This is so stated in Strange's Manual of Hindu Law. So far their Lordships are prepared to assume the law peculiar to the Nayars to be established, and not to require proof in any particular case. But beyond this they are not prepared to go. The passage in Strange's Manual does not really mean more than above stated. There is no sacred book or other writing having legal authority, and there is no series of decisions which can be appealed to in order to determine the circumstances under which, and the consents, if any, subject to which the Karnavan for the time being can adopt strangers into the family, and thereby make them and their descendants heirs to its property. Their Lordships are clearly of opinion that under these circumstances the burden of proving the validity of the adoption made in this case is upon those who assert its validity; and that the only

question which their Lordships have to consider is whether the appellants have shown that the adoption in dispute in these proceedings is in accordance with the law or custom of the Nayars."

"Mr. Mayne in his very able argument drew attention to all the authorities bearing on the point, and to some previous adoption deeds, and to the verbal evidence adduced by the parties in this particular case. The authorities and adoption deeds do not really come nearly up to what is wanted. Not one of them shows that a Karnavan ever adopted a stranger into the family without consulting the other members of it."

"The witnesses called at the trial certainly do not prove any custom warranting such an adoption. The witnesses called by the plaintiffs distinctly negative it. Those called by the defendant say in chief that the custom goes this length; but not one of them can give an instance in which he knew it was done. The witnesses are the ninth, tenth and eleventh. The ninth, the Rajah of Calicut, however, stated distinctly in re-examination that the Karnavan in such a case as that before the Court, could not adopt without the consent of his brother, unless he was an outcaste or insane. Upon such evidence it appears to their Lordships that the balance is against and not in favour of the validity of the adoption which they have to consider. Certainly its validity is far from being established" (*a*).

"Large as the powers of a Karnavan appear to be, those powers are essentially powers of management. He cannot apparently alienate the family property without the consent of the other members of the family (Anandravans), although an

(*a*) Mr. Mayne, who appeared for the appellants, comments as follows on the evidence given in this case as to adoptions among Nayars:—"Three adoptions in 1867, 1885 and 1889 were proved, in two of which the last males of the tarwad, adopted three females, and in the last the mother and the last four males adopted one female. In a fourth case in 1886 a female, the last member of a tarwad adopted a male and a female. In the case itself the Karnavan had adopted his own son and daughter and the son and daughter of his daughter. One witness said that this was improper, because it was the custom that the sons of the adoptor should marry the females who were adopted. Three other witnesses, one of whom was the Zamorin Rajah of Calicut, said that such adoptions were usual, and two instances of the kind were stated" (Hindu Law, Sixth Edition, p. 262).

unreasonable wrong-headed opposition may probably be overruled. His limited power of alienation renders it improbable that he should have the wide power of adoption contended for by the appellants, the power, *i e.*, without consulting other members of the family, of introducing strangers into the tarwad and making them heirs to its property. Such a power may be essential to the preservation of the tarwad when the last possible Karnavan has been reached, but the possession of such a power by any Karnavan who is not the last surviving head of his tarwad seems to their Lordships to be unnecessary, and to be unjust to those members of the family who may survive him and become Karnavans in their turn. In the absence of proof, it would be contrary to sound legal principles to hold that any such power was conferred by any alleged custom" (*a*).

In Canara it was held by the Sudder Court that the female ejaman or manager could not adopt if she had male issue living (*b*), but, as it is the absence of female, not of male, issue that would render the family liable to extinction, Mr. Wigram, in the first edition of this work, was inclined to doubt the soundness of this decision. In 1889, however, the principle laid down by the Sudder Court in 1859 was adopted by the High Court in Chandu *v.* Subba. In that case the last female member of an Aliyasantana family made an adoption without the consent of her son who was suffering from leprosy. The High Court (Muttusami Ayyar and Shephard, JJ.,) held that, if it were not for the fact that the son suffered from leprosy, there could be no doubt that he was entitled to question the adoption made by his mother and proceeded to consider as to whether his leprosy deprived him of that right, observing as follows:—

"It is necessary to decide the question whether the plaintiff's leprosy deprives him of his right to question the adoption made by his mother, the defendant. That the plaintiff as son

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(*a*) Thiruthipalli Raman Menon *v.* Variangattil Palisseri Raman Menon, L. R. XXVII., I. A. 231; S. C., I. L. R., XXIV Madras, 73.

(*b*) Cotay Hegaday *v.* Manjoo Kumpty, Sudder Decisions, 1859, p. 138.

of the defendant would, but for his disease, have, under the Aliyasantana system, the right claimed by him there can be no doubt. It was held by the late Sudder Court, in Cotay Hegaday *v.* Manjoo Kumpty (*a*), that the last female member of an Aliyasantana family having a son cannot, without his consent, make a valid adoption. In the present case it is found as a fact that there is no custom in South Canara excluding lepers either from management or from inheritance. * * * * The question is one of Aliyasantana usage, and in the absence of any authority warranting the adoption by the first defendant during the plaintiff's lifetime, we are not at liberty to sever from his status one of its legal incidents, *viz.*, the right to bar an adoption by his mother" (*b*).

Among the Nambudris the system of introducing male heirs when the family is in danger of becoming extinct exists, but it is difficult to say whether the Courts would recognize such a custom when the family is represented solely by females.

In Muttoor Manakel *v.* Poovully Manakel the Sudder Court (Hooper, Macleod and Strange, JJ.,) had before them a case of disputed succession in a Nambudri illam. Their judgment is as follows:—

"It appears agreed upon by both parties that the Kypanjeri illam vested in Savitri, that in order to continue succession in the illam, she, according to a custom of the caste of Nambudris, introduced the defendant's father to beget a son in and for the illam; that he accordingly contracted a marriage, the fruit of which was a son named Kellan, and that the property then vested in the said Kellan, but on his death without issue reverted to Savitri The senior pundit, who was present at the hearing of the suit, has viewed the introduction of Kellan into the family as that of a son obtained by gift, and the succession to him of Savitri in the light of his adoptive mother. Kellan, the pundit explains, coming in thus as a gift, was cut off from

(*a*) Cotay Hegaday *v.* Manjoo Kumpty, Sudder Decisions, 1859, p. 138.
(*b*) I. L. R., XIII Madras, 209.

alliance with his natural kindred. The claim of the defendants to succeed as his half-brothers is hence found to be an inadmissible one.''

"The defendants still claim as the nearest relations of Savitri's husband, but as the Civil Judge has preferred the evidence offered in support of the plaintiff's pretensions as nearest of kin, this plea the Court of Sudder Adalat observe has been definitely disposed of" (*a*).

In Nangilli Antarjanam *v.* Shangaran Nambudri, the Sudder Court (Strange and Frere, JJ.) recognized the adoption of two males, aged three and six, by the widows of the eldest member of a Nambudri illam with the consent of the managing member who, according to the custom of the country, was unmarried. The suit was by the widows to get rid of the adoptees who had lost caste, and the Sudder Court does not appear to have dealt with the questions of law raised by the appeal. They found that there was an adoption in fact, that it had been acted on for many years, and that it was not open to plaintiffs to question its legality (*b*).

In Kocoonum Ramen *v.* Yatchi Antarjanam the question was treated by the High Court (Morgan, C.J., and Kindersley, J.) as one that depended entirely on the Hindu Law of adoption (*c*).

In A. S. 723 of 1877 (South Malabar), the District Judge held that the adoption of a sister's son in the family of a Malabar Brahman was probably invalid, but treated the adoptee as a testamentary heir and his decision was confirmed on appeal by the High Court.

In A. S. 429 of 1878 (North Malabar), the Sub-Judge held that the adoption of a sister's son among Nambudris was invalid, but that matters had gone so far that it was inequitable to allow the claimant (heir by appointment) to set up the rule of law.

(*a*) Sudder Decisions, 1855, p. 125.

(*b*) R. A. 52 of 1861. Sudder Decisions, 1862, p. 59.

(*c*) S. A. 474 of 1872, H. C.

In Eranjoli Illath Vishnu Nambudri *v.* Eranjoli Illath Krishnan Nambudri, however, a Full Bench of the High Court (Turner, C.J., and Innes, Kindersley and Muttusami Ayyar, JJ.) held that such an adoption was valid. When this case came in the first instance before the High Court an issue as to whether the adoption of a sister's son by Nambudris was sanctioned by customary law was sent down for trial by the Sub-Judge of North Malabar. The Sub-Judge (Mr. DeRozario) recorded a mass of evidence on the point from both North and South Malabar and returned a finding on the issue sent down as follows :—

"I can see no ground for saying that the adoption by Nambudris of a sister's son is not a practice, like the other practices, sanctioned by long usage. The opinion of the leading Nambudris, that such adoptions are not illegal, and the many instances in which they are proved to have occurred, tend to show the existence of a consciousness on the part of the Nambudris, cognizant of no subtle theories based on vague metaphors, that the adoption of a sister's son is perfectly valid."

"My finding is that the adoption of a sister's son by Nambudris is sanctioned by customary law."

The Full Bench of the High Court upheld this finding and held that the evidence produced before the Sub-Judge was sufficient to establish that the adoption of a sister's son by Nambudri Brahmans was sanctioned by the customary law of Malabar (*a*).

In Tamarasherri Sivithri Antarajanam *v.* Maranat Vasudevan Nambudripad, Mr. Wigram had before him a case in which the widow and daughter of a Nambudri had alienated the whole illam property to the widow's brother's son, in consideration of his promise to marry a wife and raise up heirs to the illam and to maintain the female members till death. The daughter sued to set aside the alienation. Mr. Wigram held that the daughter had not proved that her and her mother's consent to the agreement

(*a*) I. L. R., VII Madras, 3.

was obtained by fraud, that the defendant had evaded performance of his promise, but that the plaintiff had waived her right to have the agreement rescinded on this ground, that the agreement was void as contrary to public policy, but that plaintiff being in *pari delicto* could not sue for its rescission.

On appeal the High Court affirmed the District Judge's decree. Mr. Justice Innes agreed with Mr. Wigram on all points, but Mr. Justice Kindersley held that, if the plaintiff and her mother were not, as apparently they were not, in the position of ordinary Hindu widows, there was nothing opposed to public policy in their disposing of the property, as being the last owners and competent to dispose of it absolutely (*a*).

In Vasudevan *v.* The Secretary of State for India the powers of alienation possessed by a Nambudri widow who was the sole surviving member of her illam were very fully considered by the High Court. The last male member of the Tamarasherri illam gave his only daughter Savitri in sarvasvadanam marriage to a member of another illam. Savitri's husband died without issue, and, on the death of her father not long afterwards, she and her mother were left as the sole surviving members of the illam. Savitri and her mother subsequently executed a document by which they appointed Vasudevan, the brother of the latter, heir to the illam and constituted him owner of all that belonged to it. The Secretary of State brought a suit to have it declared that on the death of Savitri the Crown was entitled to the property. The case was tried by the District Judge of Calicut and on appeal from his decision the High Court (Collins, C.J., and Muttusami Ayyar, J.) made the following observations :—

"An important question for decision is whether the property in dispute became the soudayakkam of the first defendant, and whether as such it was at her absolute disposal. This

(*a*) I. L. R., III Madras, 215.

contention, which the appellant rests on Hindu Law, is one which cannot at all be supported. The term soudayakkam is applied to that class of stridanam over which a Hindu lady had absolute power of disposition and every description of stridanam pre-supposes a gift to her, but a sarvasvadanam marriage does not necessarily imply a gift of property to the girl who is given in marriage. As pointed out by a Division Bench of this Court, in Kumaran *v.* Narayanan (*a*), sarvasvadanam marriage is referable to ancient Hindu Law, which authorised the appointment of a daughter or her male child as the legitimate son of her father for purposes of funeral obsequies and of inheritance, and the formula used during that marriage is the text of Vasishta which is as follows :—' I give unto thee this virgin (who has no brother), decked with ornaments, and the son who may be born of her shall be my son.' It is this special agreement between the bride's father and her husband that distinguishes sarvasvadanam from an ordinary marriage, and it suggests nothing more than a form of affiliation in use under ancient Hindu Law. If the appellant's contention were to prevail, a Nambudri would cease to own his property if he were to give his daughter in sarvasvadanam marriage, and it would vest at once in the daughter and be divested from him and from the daughter's future son who is affiliated as his next heir at that marriage. Under ancient Hindu Law, either a daughter was appointed by the father to be in the place of a legitimate son, or her future son was so appointed ; if the former, there was an express stipulation to that effect, and if the latter, the special agreement took the form ' that the child which shall be born of her shall be mine for the purpose of performing my obsequies.' In the first case the daughter stood in the place of a legitimate son for purposes of inheritance notwithstanding her sex, and the legal relation between her son and her father was that of a son's son ; but in the second case, it was her son who was appointed to be her father's legitimate son, and on his birth his legal relation to his maternal grandfather was that of an adopted son, the difference between this form of appointment and an ordinary adoption consisting in that the affiliation was made during the daughter's marriage and in the

(*a*) I. L. R., IX Madras, 260.

expectation that she might have a son. (See the passage cited from Hemadri in Colebrooke's Translation of the Mitakshara (*a*)). In neither mode of appointment is there any warrant for the contention that there was an implied gift of family property to the daughter by the father at the time of her marriage, though in both a son was affiliated. On the other hand, the formula used during the sarvasvadanam marriage suggests that it is not the daughter, but her future son, that is adopted as son, and that the family property is not intended to vest in her absolutely. So long as there is the prospect of a son being born, she and, through her, her husband hold the property in the event of her parent's death in trust for the heir in expectation, and, if she becomes a widow and the prospect of having a male child fails, her legal position is that of a daughter, who is retained in her father's family for the purpose of raising up an heir to it instead of, as is ordinarily the case, being transferred to her husband's family. According to ancient Hindu Law, then, she never had an absolute estate either during her father's life or after his death, though when she became a childless widow and the sole heir to the illam, she had the same right that the other widows of the family had."

"The next contention is that a Nambudri widow is at liberty to alienate the property of her family at her pleasure; that she is entitled to appoint an heir to her illam, and to authorise a Nambudri Brahman to marry for the illam and thereby raise up an heir for it. There is no doubt that it cannot be supported under Hindu Law as now administered on the East Coast in Southern India."

"The substantial question for decision in this appeal is whether, as alleged by the appellant, she has the powers claimed for her by virtue of usage having the force of law in Malabar and traceable either to some doctrine of ancient Hindu Law, now obsolete on the East Coast, or to the territorial law or usage of the Nayars." (*b*).

As to this the District Judge was directed to make further enquiry. This was done and the Judge returned

(*a*) Stokes' Hindu Law Books, p. 646.
(*b*) I. L. R., XI Madras, 157.

a finding to the effect that a lady in a Nambudri illam, who had survived all the male members of the illam and who had no known attalakadakkars, had, as to the disposal of the property of the illam and the adoption of members to continue the family, the same powers as a Hindu widow governed by ordinary Hindu Law and no more. The High Court accepted the finding of the District Judge that a Nambudri widow did not possess the power of alienation claimed by her, but were unable to concur in his opinion as to the other two powers which were claimed for a Nambudri female. They observed :—

" The first of these powers is that of appointing an heir to perpetuate her illam, which is otherwise likely to become extinct for want of heirs, and the second is a power to direct a Nambudri to marry again specially for her illam under the agreement that the son, if any, who may be born of that marriage shall be the heir to that illam. These powers relate rather to modes of affiliation of a son into a Nambudri family than of alienation of its property" (*a*).

They then proceed to compare the modes of affiliation alleged to be open to a Nambudri widow with those current on the East Coast and remark as follows :—

" Pattukayyal dattu or adoption with ten hands as a dwayamushyayana adoption is obsolete on this Coast, but we need hardly cite texts or do more than refer to Datta Chandrika, s. II, 41 and 42 (*b*), in order to show that dwayamushyayana adoption was well-known to ancient Hindu Law, though the form in which adoption now prevails on this side of the ghats is what is called sudha dattu, or adoption pure and simple, that is to say, an adoption which completely severs the person adopted from his natural family and fixes him in the adoptive family. As to a widow's power to adopt so as to perpetuate her husband's family, it is necessary that she should be expressly authorised on the East Coast either by her husband or his sapindas, and the theory is that the adoption is made not for

(*a*) I. L. R., XI Madras, 157.
(*b*) Stokes' Hindu Law Books, 646.

herself but for her husband. The practice among Nambudris is otherwise. The theory is the same among them also, but in its application the husband's authority is presumed unless there is an express prohibition."

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The learned Judges then refer to certain of the sacred texts in which it was laid down that, where there was no prohibition from the husband, it should be held that there was an implied assent on his part to his widow adopting a son and also to texts where the adoption of an adult and even of a married person was approved of and observe:

"There is thus no ground for the suggestion that, because the modes of affiliation said to be current among Nambudris are not now recognised on the East Coast, they cannot be referred to ancient Hindu Law, or the personal law which they carried with them when they settled in Malabar" (*a*).

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(*a*) I. R., XI Madras, 157.

The learned Judge who drafted this Judgment (Sir T. Muttusami Aiyar) then proceeds to consider the question as to the probable date when the Nambudris settled in Malabar. He was of opinion that the fact that the sarvasvadanam marriage was recognized in Malabar, while there was no allusion to it in the Mitakshara as a form of marriage in use was evidence that the migration of the Nambudris must have taken place before the Mitakshara was written. He alludes to an opinion expressed by Mr. Logan, in his report as Special Commissioner on tenure of land and tenants' rights in Malabar, that the Nambudris entered and settled in Malabar in large numbers and as an organized body at the end of the seventh and in the first half of the eighth century, and observes: "However this may be, and whether there was one migration or whether there were successive migrations, whether the first migration was in the seventh century or several centuries before it, there is enough to show that the personal law which the Nambudris carried with them was not Hindu Law as expounded by the authors of the Mitakshara, Smriti Chandrika, and Daya Vibhaga, but the ancient Hindu Law as it was probably understood and followed about the commencement of the Christian era." In commenting on Mr. Logan's views on this matter, Sir Charles Turner, in his minute on Malabar Land Tenures, observes (pp. 13 and 14):—

"That the Nambudris and the Nayars are foreigners is not denied. Their institutions regarding the union of the sexes suggest either that, when they arrived in Malabar, Hindu Law and therefore Hindu society

"It is clear that the appointment among Nambudris of an heir is regarded as a mode of affiliation and not as a form of alienation, and, though it is valid, it is called Kritrima adoption, not in the sense that it is unauthorised as on the East Coast, but in the sense that it takes place without any ceremony, as in the case of the other two forms of adoption, namely, adoption by ten hands or pattukayyal dattu and also adoption by chamatha, that is, by burning a pan of sacred grass."

The learned Judges then proceed to consider the evidence taken on remand with respect to the question as to whether a Nambudri widow can adopt with the view of perpetuating her illam. They observe that there are two points regarding which there is a conflict of opinion, namely, whether the sanction of the widow's husband is

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had not obtained such a stage of development as is exhibited in the Code attributed to Manu or that peculiar circumstances necessitated a departure from the social usages of the tribes or peoples whence they had emigrated."

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"Whether the Nambudri arrived with the Nayar, or, as tradition asserts, preceded the Nayar or whether, as I understand Mr. Logan suggests, he followed the Nayar, is not very material to the purpose of this minute. Seeing that but one member of the Nambudri illam was allowed to contract marriage, I cannot help thinking that the Nambudri was probably as early a settler as the Nayar."

Sir Charles Turner appears here to incline to the opinion that the Nayars separated from their parent stock at a time when those from whom they sprung practised polyandry and also, as it would seem, holds the view that the remarkable custom, under which the elder son in a Namburdi family alone as a rule contracts a legal marriage while the younger members enter into a recognized state of concubinage with Nayar females, was in all probability brought with them when they migrated to Malabar. As to all this the evidence does not render it possible for any one to give anything approaching to an authoritative opinion. Whether the Nayars brought polyandry with them to Malabar or adopted that system after their migration, and whether the Brahmans from whom the Nambudris separated followed the custom just mentioned as now prevailing among the Brahmans in Malabar are matters of mere speculation. Whence the Nayars or the Nambudris came and when they first arrived in Malabar are theories regarding which ethnologists are not prepared to pronounce with any certainty.

necessary and whether she can adopt when there are attaladakkam or reversionary heirs and add as follows:—

" As to the first, we have already remarked that the true Hindu theory is that no widow can adopt except for her husband, and that, on the East Coast, his express authority or that of his kinsmen is held to be necessary, whilst in Western India, it is presumed in the absence of an express prohibition. We have also shown that there is a text of Yajnavalkya, which bears out this theory, and that the very same interpretation is placed upon it by the author of Datta Chandrika in regard to a widow's power to give in adoption. The allusion to this special text by several of the witnesses learned in the shastras appears to us to show that the practice has a legal origin. On a point like this it is by no means a matter for surprise that there is a conflict between those who are well read and those who are not. As to the text of Yajnavalkya on the subject of want of independence in woman generally, it must be taken together with the special text, which declares her independence in respect of adoption on the ground that it is a religious and meritorious act. In dealing with this part of the case, the Judge takes the Hindu Law as now administered in this Court as the law that applied to Nambudris when they migrated to Malabar and treats the practice spoken to as an innovation; but, before doing so, it is necessary to see whether the practice is one which is inconsistent either with ancient Hindu Law or with a different interpretation of a text received as law, and whether there is ground for the presumption that the practice is the outcome of the Hindu Law or interpretation which prevailed when Nambudris settled in Malabar, especially when several experts refer the practice to Hindu Law and to a special interpretation."

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" As to the second point, namely, whether a widow can adopt when there are attaladakkam heirs, it is not necessary to determine it for the purposes of this appeal. It is not suggested that there are attaladakkam heirs in this case. The bulk of the evidence is in favour of her power, though, as observed by Mr. Wigram in his work on Malabar Law and Custom, the

selection is usually made from them. It may be an open question whether a stranger can be adopted, but it is not necessary to decide it for the purposes of this appeal, and we do intend to decide that a widow is entitled to adopt a stranger in supersession of her husband's divided kinsmen or attaladakkam heirs. In our judgment, there is sufficient evidence to the effect that a widow can adopt or appoint an heir in order to perpetuate her illam in the absence of dayadies with ten or three days' pollution" (*a*).

Another custom among the Nambudris which has been judicially recognised is that of the sarvasvadanam marriage which seems to be a relic of the old putrikaputra (son of the appointed daughter).

There is a general impression on the Western Coast that among those who follow the rule of descent by sons, the daughter's son is not in the line of heirs.

In Chedumbaram *v.* Chedumbaram, Shupan and Aronachellam the witnesses agreed in deposing that, according to the usages of the caste, adoption was necessary to constitute the sons of daughters lawful heirs to their grandfather and the Sudder Court confirmed the judgment of the Provincial Court accepting this view as correct (*b*).

In A. S. 123 of 1877 (South Malabar), which was a suit between Pattar Brahmans, a divided brother set up a claim to inherit in preference to the daughter and the daughter's son.

When a Nambudri illam is in danger of becoming extinct, it is a common practice to perform a sarvasvadanam marriage, by virtue of which, at the death of the father, the whole estate is placed under the management of the son-in-law in trust for the lawful issue of his marriage.

(*a*) I. L. R., XI Madras, 157.

(*b*) 1 Sudder Decisions, 157. The parties to this case were all Chetties, members of what is called the Valia Vitil Tarwad. The record does not show to what part of Malabar they belonged.

A question has been raised as to whether a sarvasvadanam adoption can be made without the consent of all the remaining members of the illam. As to this Mr DeRozario, the Sub-Judge of Calicut held as follows:—

"The effect of sarvasvadanam is tantamount to the effect of an adoption. The issue of the marriage becomes the heir to the family and the manager of the estate. It appears to me that the consent of all the members of the family is necessary for the introduction of a stranger into the family by whose advent the interests of the members are affected. There are cases where for the conservation of the family estate the will of the majority is sometimes allowed to prevail. But the effect of the sarvasvadanam is not to conserve the estate for the real owners but for a stranger and his heirs and for such an act it appears to me that the consent of all capable of consenting is necessary. It cannot be contended that two out of three joint owners of an estate can make a gift of the whole estate to a stranger reserving to the third owner a mere right to maintenance, and this is what sarvasvadanam in the present case really amounts to" (*a*).

When this decision came before the High Court on Second Appeal the Judges (Muttusami Ayyar and Parker, JJ.), were not satisfied that the decision of the Sub-Judge was in accordance with custom, and called on him to take evidence and decide the issue as to whether in a Nambudri family, consisting only of the widows of deceased brothers, the previous consent of all was necessary for a valid sarvasvadanam marriage. The Sub-Judge found that, where no one but a widow objects, the marriage must be held to be valid as being for the benefit of the souls of deceased ancestors. The High Court, however, was not satisfied and ordered further enquiry. The Sub-Judge adhered to his former decision, and the Second Appeal was dismissed without any decision being arrived at, as the learned Judges (Shephard and Best, JJ.), before

(*a*) A. S. 594 of 1891, Sub-Court, Palghat.

whom it eventually came, held that the appellants had no *locus standi* (*a*).

Whether the interest of the son-in-law is, in the absence of a provision to contrary, divested by the failure of issue of the marriage, is a question on which there is no conclusive decision. In two cases in South Malabar Mr. Wigram held, mainly on the authority of what the old vakils stated, that the son-in-law's personal interest ceased on failure of issue.

In Keshava Tharagan *v.* Rudran Nambudri (South Malabar) the sarvasvadanam marriage was accompanied by the formal appointment of the son-in-law as heir to the illam, and he entered upon his duties as head of the illam after the appointer's death, his position further being recognised by the nearest dayadi. On these facts the District Judge held that the son-in-law was, on failure of issue of his marriage, the lawful heir. When this case came before the High Court on Second Appeal the Judges (Turner, C.J., and Kindersley, J.), confirmed the decision of the District Judge, on the ground that an immediate interest in the property of the illam analogous to that of a son had been conferred on the son-in-law by the deed of sarvasvadanam, and did not decide the question as to how matters would have stood if there had been no such document. They observed as follows :—

"The ordinary incidents to this sarvasvadanam custom have not as yet been ascertained after any complete inquiry. The Judge refers to two of his own decisions, of which the latter follows the earlier, and the earlier proceeds, not so much on evidence, as on the hypothesis that the custom is a survival of the obsolete practice of constituting as heir the son of an appointed daughter. These rulings cannot then be safely accepted as conclusive. It is agreed that the effect of the custom is to introduce the son into the illam, to confer on him the status of a son in respect of the property of the illam, coupled with the

(*a*) Parameswaram Nambudri *v.* Konampulakal Sankaran Nayar, S. A. 765 and 766 of 1892.

obligation of managing, or assisting in the management, of the estate and of supporting the family."

"The Judge considers, and the appellant's pleader insists, that ordinarily on failure of issue to the son-in-law by the daughter of the family, his interest in the illam property ceases."

"The respondent's pleader, on the other hand, denies there is any such divesting of the interest once taken. It would be impossible to determine which view is correct, either in reference to evidence on the record, or in advertence to any sufficient authority known to us. It is, however, unnecessary to arrive at a decision in this case, for the Judge finds, and his finding is supported by the deed of sarvasvadanam, that in this case Damodaram and his wife Savitri conferred on the second defendant an immediate interest in the property of the illam, analogous to that of a son, and that this gift was ratified after the death of Damodaram by Jadavedan, the nearest natural male heir of the deceased "(*a*).

The question as to the right of the son-in-law (Sankaran Nambudri) in this sarvasvadanam marriage to the property of the illam, his wife having died childless, came a second time under the consideration of the Courts in 1898. The Sub-Judge of Palghat, before whom the case (Chemnantha Attekunnath Lakshmi Amma *v.* Palakuzhu Thuppan Nambudri) was tried, held that, the sarvasvadanam wife of Sankaran Nayar having died issueless, the property of her illam became his exclusive property and passed on his death to his mana. When the case came before the High Court on Second Appeal the correctness of this decision was stronly contested. In their decision (*b*) the High Court (White, C. J., and Moore, J.) observed as follows :—

"If the Subordinate Judge intended to lay down as a rule of law that notwithstanding the death of the wife without issue, the property of her illam vested absolutely in her husband by virtue of his affiliation under his sarvasvadanam marriage it

(*a*) I. L. R., V Madras, 259.
(*b*) I. L. R., XXV Madras, 662.

is very doubtful if his decision could be upheld. In Keshava Tharagan *v.* Rudran Nambudri (*a*) the question, as to whether the interest of the son-in-law divested by failure of issue of a sarvasvadanam marriage, was considered but not decided and in two more recent decisions (Kumaran *v.* Narayanan (*b*) and Vasudevan *v.* The Secretary of State for India (*c*)) in which the nature of a sarvasvadanam marriage was very fully considered, it was not necessary to decide the question now under consideration. In the latest judgment of importance delivered by the High Court relating to marriages of this description (Amayur *v.* Kotimadhathil Itticheri and the Secretary of State for India (*d*)) the decision of the majority of the Judges (Muttusami Ayyar and Parker, JJ., Shephard, J. dissenting) is clearly in favour of the contention now advanced on behalf of the appellants. That judgment has, however, not been reported (*e*). Under these circumstances it cannot be held

(*a*) I. L. R., V Madras, 259. (*b*) I. L. R., IX Madras, 260.

(*c*) I. L. R., XI Madras, 157. (*d*) S. A. 800 of 1887.

(*e*) This question was considered by the learned Judges in this judgment mainly with reference to a sloka* in the Laws of Manu which it must be admitted does not form a very satisfactory basis for a decision on a question of Nambudri Customary Law. In the course of his judgment Muttusami Ayyar, J., observes as to this as follows :—

"This practice of appointing an heir to the illam, when a person is authorized to beget an issue for the illam by marrying a girl selected to perpetuate the illam on the analogy of sarvasvadanam marriage and when he marries a girl born in the illam in the sarvasvadanam form, implies that, when the sarvasvadanam son-in-law is intended to be made an heir, he is constituted as such by special appointment. As observed in that case the use of sarvasvadanam marriage as a mode of affiliation followed the obsolete law of inviting a kinsman to beget a son on a woman to whom he was not married, thereby substituting sexual union in wedlock for an irregular intercourse which was reproved by several Smritis as a practice fit only for cattle. As the person invited to beget a male issue on a woman acquired no right in the property of the illam to which she belonged, the sarvasvadanam son-in-law likewise acquired none unless he was expressly appointed heir to the illam. As for the sloka* it is no

* "But if an appointed daughter by accident dies without a son the husband of the appointed daughter may without hesitation take that estate." Sloka No. 135, Chapter IX of the Laws of Manu. Sacred Books of the East, Vol. XXV., p. 353.

that the question now under consideration is concluded by authority. It is, however, not necessary to decide it in the present Second Appeal inasmuch as the 2nd, 3rd and 4th defendants (appellants) have in their written statement clearly admitted that Sankaran Nambudri obtained the properties as a gift from his wife's illam. * * * * * In the face of this admission it is impossible for the appellants to contend that, on the death of his sarvasvadanam wife, Sankaran Nambudri lost all his rights over the property of her illam. It may be mentioned that this gift has already come under the consideration of the High Court in Keshava Tharagan *v.* Rudran Nambudri (*a*).

In Kumaran *v.* Narayanan the question arose as to whether the son of a daughter given in sarvasvadanam form of marriage retained any right of inheritance in the illam to which her father belonged and it was held that, " whether or no the father continued entitled himself to share in the revenue of the illam which he left, it is clear that his son, who was born into and was the son of another illam, could never have a chance of succession in his father's illam unless the line of that illam became extinct, in which case he might come in as attaladakkam heir

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doubt in favour of the appellant, if it can be accepted as living law among Nambudris. But I hesitate to accept it as such for several reasons. Having regard to the mode in which Hindu Law as now received by the people has attained development since the Institutes of Manu were written, it would be unsafe to treat them as if they were rules of Statute Law which must be taken to be in force unless they are repealed. The Smritis and commentaries are to be regarded as constituting together evidence of the law as received by them and reflected in their usage. * * * * Apart from absence of corroboration by other Smritis or by commentaries, the appellant was unable to show by satisfactory evidence that the usage of Nambudris reflects the text. On the other hand, the practice of appointing an heir when a person is invited to beget issue for the illam and of regarding sarvasvadanam marriage as a contingent adoption and retaining the daughter as a member of her father's family is inconsistent with the view that the sarvasvadanam son-in-law is an heir to the illam after the daughter by reason of the sarvasvadanam marriage." (This judgment is printed at length at 1 Madras Law Journal, p. 303.)

(*a*) I. L. R., V Madras, 259.

and would then perform the funeral ceremonies of his father's ancestors. As long as members of his father's illam lived, there could be no question of inheritance for him, being a member of another illam" (*a*).

In another case (A. S. 794 of 1879) the marriage of a sister in the sarvasvadanam form was set up, but Mr. Wigram found against the validity of the custom and his decree was confirmed by the High Court.

In Vasudevan *v.* The Secretary of State for India, to which frequent reference has already been made, the Judges point out that the sarvasvadanam form of marriage, which they considered was referable to the ancient Hindu Law of putrikaputra or of the appointed daughter and her son, was still in force among Nambudris as a mode of affiliation, although it was obsolete on the East Coast (*b*).

(*a*) I. L. R., IX Madras, 260 at pp. 264 and 265 *per* Parker, J.
(*b*) I. L. R., XI Madras, 157.

CHAPTER III.

QUASI-MARRIAGE CUSTOMS.

TALI–KATTU–KALYANAM. SAMBANDHAM.

It is generally agreed by European writers that the system of inheritance in the female line prevalent among the Nayars must have originated from a type of polyandry resembling what is termed free love (*a*). According to the accounts given by de Castanheda, Sonnerat and Buchanan, to whose writings reference is made in this chapter, the relations between the Nayar ladies and their paramours, from at all events A.D. 1550 to 1800, were of the loosest and most fugitive description. Doubts have been cast on the accuracy of Buchanan's account, but it is corroborated in a most remarkable manner by the description given by de Castanheda two hundred and fifty years previously. Buchanan was, as is well known, a most conscientious and trustworthy observer and it is scarcely possible that he can have been mistaken as to what was the custom in Malabar at the time of his visit. The ancient rule was that the woman should remain in her own house and be visited by her so-called husbands and that the eldest female should be the head of the Tarward (*b*). Time has

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(*a*) Reference may be made *inter alia* to McLennan's Studies in Ancient History, pp. 143—150 (London, 1876) and Herbert Spencer's Principles of Sociology [Vol. I, pp. 642—645 (1893)]. Mr. Spencer's observations are based almost entirely on McLennan's work. Turning to it we find that the author's authorities were a paper in the Asiatic Researches (1798, Vol. V, p. 13) by Mr. Jonathan Duncan, President of the first Malabar Commission (1792) and afterwards Governor of Bombay, Hamilton's Account of the East Indies (1744) and Buchanan's Journey through Mysore, Canara ana Malabar (1800—2). He does not mention the writings of de Castanheda (1552), John Henry Grose (1757) and Sonnerat (1788).

(*b*) It should be noted that, while the writer in the Asiatic Researches states that it was the custom for a Nayar woman "to have attached to her two males or four or perhaps more and they cohabit according to rule" and while Hamilton writes that a Nayar could have no more than

brought about modifications in this system and in Malabar, though not in Canara, the eldest female has given way to the eldest male. The wife often has a separate house provided for her where she lives with her husband and, now-a-days when so many members of Nayar tarwads leave the family house and reside permanently elsewhere as members of the several branches of the public service and as Vakils, the women with whom they have formed sambandham live with them in a strictly monogamous union. Polyandry indeed may now be said to be almost extinct. As to this, the following extract from the report of the Malabar Marriage Commission may be referred to :—

"If by polyandry we mean a plurality of husbands publicly acknowledged by society and by each other and sharing between them a woman's favours by mutual agreement, the legal and regulated possession publicly acknowledged of one woman by several men who are all husbands by the same title, it may be truly said that no such custom is now recognized by the Marumakkathayam castes in Malabar. If by polyandry we simply mean a usage which permits a female to cohabit with a plurality of lovers without loss of caste, social degradation or disgrace, then we apprehend that this usage is distinctly sanctioned by Marumakkathayam and that there are localities where and classes among whom this license is still in practice" (*a*). I may also quote the following opinion arrived at as to this question by Sir T. Muttusami Ayyar, President of the Commission, after hearing all the evidence given by the witnesses examined:—"There is positive evidence to show that polyandry still lingers in the Ponnani and Walluvanad Taluks, especially on the Cochin frontier of the former Taluk. There is a general reticence on this subject among the witnesses, probably because, as stated by one of them, it is considered that a candid

twelve husbands and Grose says that the number was limited not so much by any specific law as by a kind of tacit convention, it scarce ever happening that it exceeded six or seven, de Castanheda, Sonnerat and Buchanan place no limit to the number of men who were allowed to visit a Nayar lady.

(*a*) Report of the Malabar Marriage Commission, p. 12.

acknowledgment of its existence is a reflection on the community to which they belong and that it is not proper for a man of respectability to say that it prevails among his neighbours. The fact that a woman has occasionally had four or five husbands in succession is some internal evidence that polyandry has only recently gone out of recognized practice in South Malabar. Among carpenters and blacksmiths in the Calicut, Walluvanad and Ponnani Taluks several brothers have one wife between them although the son succeeds the father amongst them "(*a*).

Instances of polyandry will, it is believed, not be met with except in a few isolated cases and in certain remote localities. Although the children in a Nayar tarwad are still the children of their mother rather than of their father, yet, I am of opinion that the connection between the parents which is termed sambandham should be looked on, not as concubinage pure and simple, but rather as quasi-marriage contract based on mutual consent and dissoluble at will. It has been argued that polyandry was introduced by the Brahmans for their own selfish ends and that the kalyanam ceremony which every Nayar girl performs before attaining puberty, but which has no relation whatever to the real marriage, indicates a period when marriage was as elsewhere in India a religious institution. The kalyanam ceremony was probably introduced by the Brahmans. It is, however, admittedly a mere formal ceremony. By it the so-called bridegroom incurs no liabilities and acquires no rights. It may be true that, but for the Brahmans, all traces of polyandry would long since have disappeared and that the Brahmans have encouraged concubinage between the younger members of their families and the Nayar women for the purpose of maintaining the impartibility of their estates. It is, however, impossible to believe that polyandry was introduced into Malabar by the Brahmans.

(*a*) Memorandum A annexed to the report of the Malabar Marriage Commission, pp. 3 and 4.

As Sir T. Muttusami Ayyar observes a "handful of Brahmans, who must have settled in Malabar in small groups from time to time, could not have succeeded in uprooting the national institution of marrage, if any, even if they had attempted to do so" (*a*). There appear to be valid reasons for holding that the Nayars entered the country before the Brahmans and had settled down there under a military organization before Nambudris were heard of in Malabar.

That the Nayars are Dravidians and that they should therefore not be termed Sudras there can, I think, be but little doubt. If a reference is made to the Anglo-Indian Glossary by Yule and Burnell it will be found that the term Naik or Nayakan and the word Nayar are derived from the same Sanskrit original (*b*), and there is a considerable amount of evidence to show that the Nayars of Malabar are closely connected by origin with the Nayakans of Vijayanagar (*c*). Xavier, writing in 1542 to 1544, makes frequent references to men whom he calls "Badages" who are said to have been collectors of "royal taxes" and to have grievously oppressed Xavier's converts among the fishermen of Travancore (*d*). Dr. Caldwell, alluding to Xavier's letters, says that these Badages were no doubt Vadages or men from the North and is of opinion that a Jesuit writer of the time who called them Nayars was mistaken and that they were really Nayakans from Madura (*e*). I believe however that the Jesuit rightly called them Nayars, for I find that Father Organtino,

(*a*) Memorandum A annexed to the report of the Malabar Marriage Commission, p. 3.

(*b*) Glossary of Anglo-Indian terms by Colonel Yule and Dr. A. C. Burnell, Second Edition, p. 615.

(*c*) Reference may be made to "A Forgotten Empire" (Vijayanagar) by Mr. R. Sewell for information as to these Nayakans.

(*d*) Father Coleridge's Life and Letters of St. Francis Xavier, Vol I., pp. 208, 214, 223, 225, and 238.

(*e*) Caldwell's History of Tinnevelly, p. 69. Dr. Caldwell does not give the name of the Jesuit to whom he alludes, but he probably was Father Organtino.

writing in 1568, speaks of these Badages as people from "Narasinga (a kingdom north of Madura lying close to Bisnaghur)" (*a*). Bisnaghur is of course Vijayanagar and the "Kingdom of Narasinga" was the name frequently given by the Portuguese to Vijayanagar (*b*). Almost every page of Mr. Sewell's interesting book on Vijayanagar bears testimony to the close connection between Vijayanagar and the West Coast. Dr. A. C. Burnell tells us that the kings who ruled Vijayanagar during the latter half of the fourteenth century "belonged to a low non-Aryan caste, namely, that of the Canarese cow-herds" (*c*). They were therefore closely akin to the Nayars, one of the leading Rajas among whom at the present time, although officially described as a Samanta, is in reality of the Eradi, *i.e.*, cow-herd caste (*d*). It is remarkable that Colonel (afterwards Sir Thomas) Munro, in the memorandum written by him in 1802 on the Poligars of the Ceded District, when deaing with the cases of a number of Poligars who were direct descendants of men who had been chiefs under the Kings of Vijayanagar, calls them throughout his report Naique or Nair, using the two names as if they were identical (*e*). Further investigaion as to the connection of the Nayars of Malabar with the kingdom of Vijayanagar would, I believe, lead to interesting results.

There are cogent reasons for agreeing with the view expressed by Mr. Wigram in the first edition of this book

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(*a*) Coleridge's Xavier, Vol. I., p. 209 (note).

(*b*) Sewell's Forgotten Empire, p. 236 (note).

(*c*) Burnell's translation of the Daya Vibhaga. Introduction, p. 10, *vide* also Elements of South Indian Palæography (Second Edition, p. 109), where Dr. Burnell says that it is certain that the Vijayanagar Kings were men of low caste.

(*d*) *Vide* Glossary appended to the Report of the Malabar Marriage Commission, p. 2 and Day's Land of the Perumals, p. 44.

(*e*) Fifth Report of the Committee on the affairs of the East Indian Company, Vol. II., pp. 499 and 530 (Higginbotham's Reprint).

that, if it had not been for the Brahmans, all traces of polyandry would long ago have died out in Malabar but, on the other hand, it is worthy of note that, notwithstanding that the Brahmans of South Canara are not in the habit of forming illicit connections with girls of the Tulu caste, polyandry continued to flourish among the Tulus till quite recent years (*a*).

As to the powerful motives which operate to induce Brahmans to do all they can to uphold the existing system of illicit connections between their males and Nayar females the following remarks of a recent Nayar writer, who is an ardent advocate for the abolition of the present custom, may be noted :—

"The Aryan Brahmans when they came into the country had the same social organization as exists among their successors of to-day. Their laws strictly ordain that only the eldest member of a household shall be left free to enter into lawful wedlock with a woman of their own caste, the younger members being left to shift for themselves in this matter (*b*). In ancient times the only asylum which these latter could find in the existing state of their social circumstances was in the Nayar families which settled round about them. It should in this connection be remembered that the Brahmans formed an aristocratic order and as such they were the exclusive custodians and expositors of the law. Naturally enough, too, large numbers of Brahman younger sons, who were looking about for wives, turned to the Nayar families and began to enter into illegitimate unions of the nature of concubinage. Now the sanctity of formal and religious marriages

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(*a*) South Canara Manual, Vol. I., p. 142.

(*b*) It is very doubtful if these statements are accurate. There are no grounds for supposing that the Nambudris, when they originally entered Malabar, had already adopted the system under which the elder member of the family alone contracts a legal marriage while the others enter into concubinage with females of non-Brahman castes. It is also incorrect to say that there is any "law" which prevents the younger members of a Nambudri family from marrying. As to this reference may be made to Chapter I., pp. 26—29.

was incompatible with the looseness and degradation involved in these illegitimate unions and Brahman ingenuity discovered a ready means of getting over the difficulty by a social prohibition of all valid marriages among the Nayars. * * *

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To enforce this social edict upon the Nayars the Brahmans made use of the powerful weapon of their aristocratic ascendancy in the country and the Nayars readily submitted to the Brahman supremacy. Thus it came about that the custom of concubinage, so freely indulged in by the Brahmans with Nayar women, obtained such firm hold in the country that it has only been strengthened by the lapse of time. At the present day there are families, especially in the interior of the Malabar district, who look upon it as an honour to be thus united with Brahmans. But a reaction has begun to take place against this feeling and Brahman alliances are invariably looked down upon in respectable Nayar Tarwads" (*a*).

Another theory that has been propounded as to the origin of polyandry among the Nayars is that they were not polyandrous when they first entered Malabar but deliberately adopted that custom as being one well suited to their military habits. Of the warlike propensities of the Nayars there can be no doubt. They are, as has been remarked in the Introduction, attested by the employment of implements of war in their household ceremonies, by the establishment in each village or Tara of a Kalari or gymnasium where their youth were taught to accustom themselves to the use of arms and perhaps also by their isolated mode of living in the midst of fenced gardens.

When considering the question as to whether polyandry was introduced by the Brahmans among the Nayars for their own selfish ends or is in reality due to their military organization, it may not be out of place to refer to the explanation given as to the origin of the custom by Montaigne in his Essays. He evidently was of opinion that polyandry was introduced because the Nayar leaders

(*a*) Malabar and its Folk, by T. K. Gopal Panikkar, pp. 36—38.

like Cetewayo looked on an "army of bachelors" as the most effective instrument in war. He says in his "Essay upon some verses of Virgil":—

"Those of Calicut made of their nobility a degree above humane. Marriage is interdicted and all other vocations except warre. Of concubines they may have as many as they list and women as many lechardes without jealousie one of another. But it is a capital crime and unremissible offence to contract or marry with any of different condition; nay they deeme themselves disparaged and polluted if they have but touched them in passing by" (*a*).

Since the second edition of this book was published I have been so fortunate as to come across the source from which I have but little doubt that Montaigne obtained his information as to the "nobility of Calicut." It is a History of the discovery and conquest of India by the Portuguese written by Fernao Lopes de Castanheda and published in the years 1551 to 1561. The following is his account of the domestic life of the Nayars. "By the laws of this country these Nayars cannot marry so that no one has any certain or acknowledged son or father; all their children being born of mistresses with each of which three or four Nayars cohabit by agreement among themselves. Each one of this confraternity dwells a day in his turn with the joint mistress counting from noon of one day to the same time of the next after which he departs and another comes for the like time. They thus spend their lives without the care or trouble of wives and children yet maintain their mistresses well according

(*a*) Essays of Michael, Lord of Montaigne, translated by John Florio, published in Lubbock's Hundred Books. The third book of the Essays, in which this essay is to be found, was first published in 1588, *i.e.*, more than three hundred years ago, while the Kerala Mahatmyam and Keralolpatti, written by Nambudri Brahmans and frequently quoted as if they were authorities, are certainly not more than two hundred years old, if indeed they can honestly claim anything like so respectable an age. There are strong grounds for believing that they are forgeries dating from the close of the eighteenth or the opening of the nineteenth century.

to their rank. Any one may forsake his mistress at his pleasure and in like manner the mistress may refuse admittance to any one of her lovers when she pleases. These mistresses are all gentlewomen of the Nayar caste and the Nayars besides being prohibited from marrying must not attach themselves to any woman of a different rank. Considering that there are always several men attached to one woman the Nayars never look upon any of the children born of their mistresses as belonging to them, however strong a resemblance may subsist, and all inheritances among the Nayars go to their brothers or the sons of their sisters born of the same mothers, all relationship being counted only by female consanguinity and descent. This strange law prohibiting marriage was established that they might have neither wives nor children on whom to fix their love and attachment and that, being free from all family cares, they might the more willingly devote themselves to warlike service. And the more to animate these gentlemen in the service of the wars and to encourage them to continue in the order of the Nayars, they are privileged from all imprisonments and from the punishment of death on all ordinary occasions except for the following crimes killing another Nayar or a cow, which is an object of worship, sleeping or eating with an ordinary woman or speaking evil of the king" (*a*).

Mr. Warden, who was Collector of Malabar from 1804 to 1816, in a report written by him to the Board of Revenue in 1815, gives the same explanation of the origin of polyandry and the Marumakkathayam system of

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(*a*) The following is the full title of de Castanheda's book. "Historia de Descobrimento e conquista da India pelos Portuguezes." It covers the period from 1497 to 1549 and was published from 1551 to 1561 by Fernao Lopes de Castanheda (Abuquerque. Rulers of India Series, p. 10). The translation quoted in the text will be found in "A General History and Collection of Voyages and Travels," by Robert Kerr (1811), Vol. II., p. 353.

inheritance in Malabar as Montaigne and de Castanheda. He writes as follows :—

"It would appear that the Governments of the Malabar Rajahs were purely military. Their profession was arms and they had only their arms to rely on for their independence. The Nayars formed the military order in the state and held also the different offices of administration, which it may be supposed were generally distributed among those whom advanced age or other infirmities rendered unfit for active service. Their military constitution * * * may have given rise to the singular custom of inheritance which obtains among the Nayars. The profession of arms by birth, subjecting the males of a whole race to military service from the earliest youth to the decline of manhood, was a system of polity utterly incompatible with the existence amongst them of the marriage state. Without matrimony the existence of the common Hindu laws of inheritance was equally incompatible. Such, I apprehend, was the condition of the Nayars under their ancient Governments from which condition originated their customs of inheritance through the female line, without reference to the paternal parent, a custom that has afforded matter for much speculative opinion. It is obvious from the nature of their professional duties that their sexual intercourse could only have been fugitive and promiscuous and that their progeny could never under such circumstances have depended on them for support."

From Mr. Robert Sewell's work on Vijayanagar we learn that from about 1336 to 1570 Malabar formed a portion of the Vijayanagar Empire and that large drafts of soldiers from Malabar, who it may reasonably be presumed were mostly Nayars, took part in the final defence of Vijayanagar when that city was sacked and destroyed by the Muhammadans in 1565, *i.e.*, much about the time that Montaigne's Essays were written (*a*).

That the Nayars for some centuries after they first settled in Malabar had all the characteristics of a warlike

(*a*) A Forgotten Empire by Mr. R. Sewell, p. 201.

race there can be no question (*a*). The following account of the warlike training that a young Nayar went through will be found in de Castanheda's history. I have inserted it in full, as de Castanheda's work is but little known and as he is one of the earliest travellers a record of whose observations has been preserved. It should always be borne in mind that he visited Malabar some two hundred and fifty years before the Kerala Mahatmyam was concocted. The Portugese traveller writes as follows :—

"It is not permitted to any Nayar to assume arms or to enter into any combat till he has been armed as a knight. When a Nayar becomes seven years old he is set to learn the use of all kinds of weapons, their masters first pulling and twisting their joints to make them supple and then teaching them to fence and handle their arms adroitly. Their principal weapons are swords and targets and these teachers who are graduates in the use of the weapons are called Panikkars, who are much esteemed among the Nayars, and all their former scholars, however advanced in life or however high their dignity, are bound at all times to give them due honour and reverence. When they meet likewise every Nayar is obliged to take lessons from these professors for two months yearly all their lives. By this means they are very skilful in the use of their weapons in which they take great pride. When a Nayar desires to be armed as a knight he presents himself before the king accompanied by all his kindred and friends and makes an offering of sixty gold fanams on which he is asked by the king if he is willing to observe and follow the laws and customs of the Nayars to which he answers in the affirmative. Then the king commands him to be girt with a sword and, laying his right hand on his head, utters certain words, as if praying in so low a voice that he is not heard. The king then embraces the young Nayar, saying aloud in their language 'Take good care to defend the Brahmans and their kine.' On this the Nayar falls down and does reverence to

(*a*) Reference as to this may be made to an article in the Malabar Quarterly Review, Vol. I. (June 1902), pp. 83 to 97.

the king and from that time he is considered a knight or member of the fraternity of Nayars" (*a*).

It has been suggested that the isolated manner in which a Nayar's Tarwad house is as a rule found to be located is due to the fact that at one time every such house formed a sort of small fort. As to this Mr. Mayne writes in his Hindu Law :—

"The Nayars, whose domestic system presents the most perfect form of the joint family now existing, never have formed village communities. Each Tarwad lives in its own mansion, nestling among its palm trees, and surrounded by its rice lands, but apart from, and independent of, its neighbours. This arises from the peculiar structure of the family, which traces its origin in each generation to females, who live on in the same ancestral house, and not to males, who would naturally radiate from it, as a separate but kindred branches of the same tree" (*b*).

That this manner of locating their houses, so different from the way in which the Hindus of all castes on the east coast congregate in streets, has prevailed for many centuries is shown by the casual remark of the famous African traveller Ibn Batuta who visited this district in 1342-47. Writing of Malabar he says :—

"Everybody here has a garden and his house is placed in the middle of it and round the whole of this there is a fence of wood up to which the ground of each inhabitant comes." This description, as Mr. Logan observes when quoting it in his District Manual, is literally true of the Malabar of to-day (*c*).

The idea that the family system of the Nayars may be partially due to their military organisation is not so fanciful as might at first be imagined. They lived in isolated houses, which it is shown were in reality small forts.

(*a*) Kerr, Vol. II., p. 354.
(*b*) Mayne's Hindu Law, Sixth Edition, p. 288.
(*c*) Logan's Malabar Manual, Vol. I., p. 289.

Dwelling in this manner, and not in villages as is the universal custom among Hindus on the east coast, they would feel it a matter of vital importance to keep the members of the tarwad together. Family feeling is stronger among women than men. The Nayar men must have felt that their sisters, if kept as permanent residents in the family house, were certain to remain staunch and loyal members of their tarwad and also to bring up their children as such. It was far safer, they must have thought, to keep their own sisters in the tarwad house than to bring into it as wives strange women from distant, and perhaps even hostile, families, who would in all probability never become loyal members of their new homes.

Considering the scanty and unsatisfactory nature of the evidence available, it would be rash to express any dogmatic opinion as to the origin of polyandry among the Nayars, but the theory that, in my opinion, has most to recommend it is that the Nayars, when they separated from their fellow Dravidians on the east coast and entered Malabar, were already a polyandrous people and that that custom was neither deliberately adopted by them for reasons connected with their military organisation after they had settled down in Malabar nor subsequently introduced among them by the Brahmans. As Mr. Mayne points out, both the former and the present existence of polyandry among the Non-Aryan races of India is beyond dispute (*a*). In his history of Indian and Eastern Architecture Mr. Ferguson quotes an observation made by Colonel Kirkpatrick, in his work on Nepaul, that it is remarkable that the Newar women (Nepaul), like those among the Nayars, may have as many husbands as they please, being at liberty to divorce them continually on the slightest pretence, and then adds:— "Dr. Buchanan Hamilton also remarks that 'though a small portion of the Newars have forsaken the doctrine of Budha and adopted the worship of Siva, it is without chang-

(*a*) Mayne's Hindu Law, Sixth Edition, p. 72.

ing their manners, which are chiefly remarkable for their extraordinary carelessness about the conduct of their women'; and he elsewhere remarks on their promiscuousness and licentiousness. In fact, there are no two tribes in India, except the Nayars and Newars, who are known to have the same strange notions as to female chastity, and that, coupled with the architecture and other peculiarities, seems to point to a similarity of race which is both curious and interesting; but how and when the connexion took place I must leave it to others to determine. I do not think there is anything in the likeness of the names, but I do place faith in the similarity of their architecture combined with that of their manners and customs" (*a*). It would be presumptuous for me to give an opinion as to Ferguson's discovery of similarity in the architecture of the Nayars and that which he found in Nepaul, but I think that it may be doubted if he is correct in stating that nowhere in India, except in Malabar, Canara and Nepaul, are traces of polyandry to be found.

The generally received opinion is that, at all events, up to the date of the passing of Act IV. of 1896 (Madras), it was absolutely impossible for a man or a woman who followed the Marumakkathayam law to contract a valid marriage, using the word marriage in its ordinary popular signification. Every girl in a Nayar tarwad, while still a child, goes through a ceremony called Tali-Kattu-Kalyanam, but that this ceremony, although in name a marriage, is in reality nothing but a caste rite, the historical origin and exact significance of which are very doubtful, and is in no sense a real marriage, is now generally admitted. The Malabar Marriage Commission went very fully into this question and examined a large number of witnesses regarding it and in their report the Commissioners observe that the immense majority of the witnesses described the Tali-Kattu-Kalyanam as a fictitious marriage the origin and

(*a*) Ferguson's History of Indian and Eastern Architecture, pp. 307, 308.

meaning of which they could not explain (*a*). There can be but little doubt that the ceremony is one of purely Brahmanical origin. It was stated before the Commission that in North Malabar the Tali was generally tied by an elderly Brahman and, as to this, Mr. (now Sir Henry) Winterbotham, one of the Commissioners, expresses the opinion that the Brahman Tali-tier was a relic of the time when the Nambudris were entitled to the first fruits and it was considered the high privilege of every Nayar maid to be introduced by them to womanhood (*b*). Without giving any opinion as to the correctness or otherwise of this view, I may draw attention to the following extract from Captain Alexander Hamilton's well-known book :—"When the Zamorin marries he must not cohabit with his bride till the Nambudri or chief priest has enjoyed her and he, if he pleases, may have three nights of her company because the first fruits of her nuptials must be an holy oblation to the god she worships. And some of the nobles are so complaisant as to allow the clergy the same tribute, but the common people cannot have that compliment paid to them but are forced to supply the priests' places themselves" (*c*).

The annexed account of the ceremonies connected with a Tali-Kattu-Kalyanam was furnished to the Malabar Marriage Commission by Mr. K. R. Krishna Menon, a retired Sub-Judge :—

"The Tali-Kattu-Kalyanam is somewhat analogous to what a Devadasi (dancing girl attached to the pagodas) of other countries undergoes before she begins her profession. Among royal families, and those of certain Edaprabhus, a Kshatriya, and, among the Charna sect, a Nedungadi, is invited to the girl's house at an auspicious hour appointed for the purpose, and in the presence of friends and caste-

(*a*) Report of the Malabar Marriage Commission, p. 18.

(*b*) Report of the Malabar Marriage Commission, p. 19.

(*c*) A New Account of the East Indies by Captain Alexander Hamilton, Vol. I., p. 310 (1744).

men ties a tali round her neck and goes away after receiving a certain fee for his trouble. Among the other sects, the horoscope of the girl is examined along with those of the boys of her Inangan families, and the boy whose horoscope is found to agree with hers, is marked out as a fit person to tie the tali, and a day is fixed for the tali-tying ceremony by the astrologer, and information given to the Karnavan of the boy's family. On the appointed day the boy is invited to a house near that of the girl, where he is fed with his friends by the head of the girl's family. The feast is called 'Ayani Unu,' and the boy is thenceforth called 'Manavalan' or 'Pillai' (bridegroom). From the house in which the Manavalan is entertained a procession is formed preceded by men with sword and shield shouting a kind of war-cry. In the meantime a procession starts from the girl's house, with similar men and cries, and headed by a member of her tarwad, to meet the other procession, and after meeting the Manavalan, he escorts him to the girl's house. After entering the pandal erected for that purpose, he is conducted to a seat of honor and there his feet are washed by the brother of the girl, who receives a pair of cloths on the occasion. The Manavalan is then taken to the centre of the pandal, where bamboo-mats, carpets and white cloths are spread, and seated there. The brother of the girl then carries her from inside of the house, and, after going round the pandal three times, places her at the left side of the Manavalan, and the father of the girl then presents new cloths tied in a kambli to the pair, and with this new cloth (technically called "Manthravadi") they change their dress. The wife of the Karnavan of the girl's tarwad, if she be of the same caste, then decorates the girl by putting anklets, etc. The Purohit, called 'Elayath,' (a low class of Brahmans) then gives the tali to the Manavalan, and the family astrologer shouts 'Muhurtham' (auspicious hour) and the Manavalan, putting his sword on the lap, ties the tali round the girl's neck, who is then required to hold an arrow and a looking-glass in her hand. In rich families a Brahmani sings certain songs intended to bless the couple. In ordinary families, who cannot procure her presence, a certain Nayar, who is versed in songs, performs the office. The boy and the girl are then carried by Inangans to a de-

corated apartment in the inner part of the house where they are required to remain under a sort of pollution for three days. On the fourth day they bathe in some neighbouring tank or river, holding each other's hands. After changing cloths, they come home preceded by a procession which varies in importance according to the wealth of the girl's family. Tom-toms and elephants usually form part of the procession, and saffron water is sprinkled. When they come home the doors of the house are all shut, which the Manavalan is required to force open. He then enters the house and takes his seat in the northern wing thereof. The aunt and other female friends of the girl then approach and give sweetmeats to the couple. The girl then serves food to the boy, and after taking their meals together from the same leaf, they proceed to the pandal, where a cloth is severed into two parts, and each part given to the Manavalan and girl separately in the presence of Inangans and other friends. The severing of the cloth is supposed to constitute a divorce."

The resemblance between the Tali-Kattu-Kalyanam and the ceremonies by which a Devadasi is dedicated to her profession, and many similar ceremonies observed among other castes in Southern India, is very remarkable. It is stated in the Report of the Malabar Marriage Commission that in the case of the Tali-Kattu-Kalyanam, where the family is poor, a bridegroom is sometimes altogether dispensed with. "The girl's mother makes an idol of clay, adorns it with flowers and invests her daughter with the Tali in the presence of the idol." This, "it is observed," would seem to be an almost exact counterpart of the consecration of the East Coast Devadasi to her profession as a temple prostitute (*a*). I, however, am inclined to agree with Mr. F. Fawcett that "the ceremony is much more analogous to that obtaining in the Bellary District and round about it, through which women, called Basivis, are, after an initiatory ceremony of devotion to a deity, compelled (under certain conditions) to follow no

(*a*) Report of the Malabar Marriage Commission, pp. 19, 20.

rule of chastity, but whose children are under no degradation, than to the initiation of the Devadasi in her career of harlotry" (*a*). As to the resemblance between the Tali-Kattu Kalyanam and the dedication of a girl as a Basivi reference may be made to the judgment of Mr. H. T. Knox, an officer who knew both Malabar and Bellary well, printed in the report of The Queen-Empress *v.* Basava (*b*).

Mr. Justice Muttusami Aiyar, as President of the Malabar Marriage Commission, discussed this ceremony from a religious and historical point of view as follows :—

"According to custom every girl must go through the ceremony called 'Tali-Kattu-Kalyanam' before she attains puberty; otherwise, she is considered to lose her caste. In its essence the ceremony consists in tying a piece of gold round the girl's neck, and in its detail I notice certain observances which symbolise a few forms of religious belief amongst the people. As a religious ceremony it is taken to give the girl a marriageable status and in North Malabar she is addressed afterwards as Amma or lady. But in relation to marriage it has no significance save that no girl is at liberty to contract it before she goes through the Tali-Kattu ceremony. On the east coast a tali is regarded as a token of marriage and no woman removes it from her neck during her husband's life; but it is not so regarded in Malabar The ceremony lasts for four days and at its close the girl may remove the tali if she likes. There is a preponderance of opinion among the witnesses whom I have examined and those who have sent in answers to our interrogatories, that it does not constitute a marriage or create a right in the person who ties the tali to cohabit with

(*a*) Madras Government Museum Bulletin, Vol. III., No. 3, p. 231.

(*b*) I. L. R., XV Madras, 75. From an interesting paper on "Some Marriage Customs in Southern India," recently published by Mr. Thurston, it will be found that among many castes and tribes in various parts of the Madras Presidency customs resembling the Tali-Kattu-Kalyanam are prevalent (Madras Government Museum Bulletin, Vol. IV., No. 3, pp. 129-179).

the girl. In some parts of South Malabar, however, there is a belief that it is a marriage, but, even there, the custom is to tear up a cloth, called Kachai cloth, on the fourth day of the ceremony as a symbol showing that the marriage has been dissolved. A ceremony which creates the tie of marriage only to be dissolved at its close suggests an intention rather to give the girl the merit of a marriage right of a Samskara, or a religious ceremony, than to generate the relation of husband and wife. It must be observed here that the tearing up of the Kachai cloth is a form not gone through in North Malabar. The ceremony is designated by some to be a sacramental marriage, and, if such is the case, it is so in form but not in substance. That it cannot be otherwise is clear from the fact that the 'Manavalan,' as the person who ties the tali is usually called, does not acquire a right to cohabit with the girl. In North Malabar it is a Brahman who ties the tali and he is usually dismissed after the ceremony is over with a small present in acknowledgment of the service rendered by him on the occasion. In South Malabar it is usually an Inangan, or a man of equal caste, that ties the tali, though, according to custom in some families, a person belonging to a particular family is eligible for the purpose. Among the Marumakkathayam Tiyans of North Malabar, a woman of the barber caste formerly used to tie the tali, but a party of reformers, headed by the late Deputy Collector Mr. Kanaran, altered the practice when Sir W. Robinson was the Collector of the District, and, according to the altered practice, it is the intended husband's sister and in some cases the intended husband himself that ties the tali. It is a curious fact that the same man may at one time tie the tali upon a number of Nayar girls collected together under one decorated pandal or upon several sisters. There is also no objection to the same person tying the tali at one time on the mother and at another time on her daughter. The fact is that, whatever may have been its historical origin, the ceremony has at present no other import than that of an essential caste observance preliminary to the formation of sexual relation and is analogous to the ceremony of Samavartana prescribed for Brahman bachelors who desire to terminate the Brahmachari Asramam, or the status of a Vedic

student, and enter on Grihasta Asramam, or the status of a married man. Having regard to the fact that several of its details bear a resemblance to a portion of the marriage ritual observed by Nambudri Brahmans, it is not unlikely that they introduced the ceremony among Nayars as a caste rite, but it must be remembered that the essential element of a Brahmanical marriage, *viz.*, taking the bride by the hand, or Panigrahanam and the walking of seven steps, or Saptapadi, and the Homam, or sacrifice to the fire, are not to be found among its details" (*a*).

The earliest allusion I have come across to the Tali-Kattu-Kalyanam is in de Castanheda's history, to which I have already alluded. It is as follows:—

"These sisters of the Zamorin and other kings of Malabar have had some allowances to live upon and, when any of them reaches the age of ten, their kindred send for a young man of the Nayar caste out of the kingdom and give him great presents to induce him to initiate the young virgin, after which he hangs a jewel round her neck which she wears all the rest of her life as a token that she is now at liberty to dispose of herself to any one she pleases as long as she lives" (*b*).

This account was published some two hundred years before that given by Captain Hamilton and in it there is no mention of the Brahman as tali-tier or enjoyer of first fruits. Allusion to the Tali-Kattu-Kalyanam will also be found in Buchanan's Mysore, Canara and Malabar (*c*) and Day's Land of the Perumals (*d*).

A girl in a Marumakkathayam tarwad, having as a child gone through the empty form of marriage which I

(*a*) Memorandum attached to the Report of the Malabar Marriage Commission.

(*b*) Kerr's voyages and travels, Vol. II., p. 351.

(*c*) Vol. I., p. 95.

(*d*) "The Land of the Perumals or Cochin its past and present" by Francis Day (1863), p. 317. Neither Buchanan nor Day says anything as to a Brahman tying the tali.

have described, when she arrives at maturity is united to a Brahman or to a man of her own caste in a quasi-matrimonial connection known as Sambandham. Whether this Sambandham can be looked on as in any real sense a marriage has been the subject of much discussion. The late Mr. O. Chandu Menon, a member of the Malabar Marriage Commission, who served for years in Malabar as District Munsif and Sub-Judge, was a keen advocate of the view that Sambandham between a Nayar girl and a man of her own caste, if not between a Brahman and a Nayar woman, was a real marriage and should be looked on by the courts and society in general as such. He wrote as follows as a member of the Commission (*a*) :—

"Sambandham is the principal Malayalam word for marriage, as Vivaham is in Sanskrit. Whatever may be the basis of the Sambandhams of the Marumakkathayam Nayars, there can be no doubt that the idea which the word conveys to a Malayali is the same as the word Vivaham. The generic term Sambandham, in South Malabar, between Calicut and Nedunganad and in Ponnani, Cochin and parts of Travancore, is the only world to denote marriage."

"There would be hardly a Malayali who would not readily understand what is meant by Sambandham Tudanguga (to begin Sambandham). The meaning of this phrase, which is 'to marry', is understood throughout Keralam in the same way, and there can be no ambiguity or mistake about it."

"Of all the forms of Sambandham I consider the Pudamuri form the most solemn and the most fashionable in North Malabar. The preliminary ceremony, in every Pudamuri, is the examination of the horoscopes of the bride and the bridegroom by an astrologer. This takes place in the house of the bride, in the presence of the relations of the bride and bride-

(*a*) Any one, who is desirous of understanding the feelings with which an intelligent and educated Nayar looks on the illicit connections which unfortunately still prevail between Nambudris and girls of the Nayar caste, cannot do better than peruse "Induleka", a novel by O. Chandu Menon, translated by Mr. W. Dumergue, I.C.S.

groom. The astrologer, after examination, writes down the results of his calculations on a piece of palmyra leaf, with his opinion as to the fitness or otherwise of the match, and hands it over to the bridegroom's relations. If the horoscopes agree, a day is then and there fixed for the celebration of the marriage. This date is also written down on two pieces of cadjan, one of which is handed over to the bride's Karnavan, and the other to the bridegroom's relations. The astrologer and the bridegroom's party are then feasted in the bride's house and the former also receives presents in the shape of money or cloth, and this preliminary ceremony, which is invariably performed at all Pudamuris in North Malabar, is called 'Pudamuri Kurikkal', but is unknown in South Malabar."

"Some three or four days prior to the date fixed for the celebration of the Pudamuri, the bridegroom visits his Karnavan and elders in caste to obtain formal leave to marry. The bridegroom on such occasion presents his elders with betel and nut and obtains their formal sanction to the wedding. On the day appointed the bridegroom proceeds, after sunset, to the house of the bride accompanied by a number of his friends. He goes in procession and is received at the gate of the house by the bride's party and is conducted with his friends, to seats provided in the Tekkini or southern hall of the house. There the bridegroom distributes presents (Danam) or money gifts to the Brahmans assembled. After this the whole party is treated to a sumptuous banquet. It is now time for the astrologer to appear and announce the auspicious hour fixed. He does it accordingly and receives his dues. The bridegroom is then taken by one of his friends to the Padinhatta, or principal room of the house. The bridegroom's party has, of course, brought with them a quantity of new cloths and betel leaves and nut. The cloths are placed in the western room of the house, called Padinhatta, in which all religious and other important household ceremonies are usually performed. This room will be decorated and turned into a bed-room for the occasion. There will be placed in the room a number of lighted lamps and Ashtamangaliam which consists of eight articles symbolical of mangaliam or marriage. These are rice, paddy, the tender leaves of the cocoanut trees, an arrow, a looking-glass,

a well-washed cloth, burning fire, and a small round wooden box called 'Cheppu' made in a particular fashion. These will be found placed on the floor of the room aforesaid as the bridegroom enters it. The bridegroom with his groomsman enters the room through the eastern door. The bride dressed in rich cloths and bedecked with jewels, enters the room through the western door accompanied by her aunt or some other elderly lady of her family. The bride stands facing east with the Ashtamangaliam and lit-up lamps in front of her. The groomsman then hands over to the bridegroom a few pieces of new cloth, and the bridegroom puts them into the hands of the bride. This being done the elderly lady who accompanied the bride, sprinkles rice over the lit-up lamps and the head and shoulders of the bride and the bridegroom, and the bridegroom immediately leaves the room, as he has to perform another duty. At the Tekkini or southern hall, he now presents his elders and friends with cakes, and betel leaf and nut. Betel and nut are also given to all the persons assembled at the place. After the departure of the guests the bridegroom retires to the bed-room with the bride."

It is somewhat remarkable that, while the Tali-Kattu-Kalyanam is mentioned by de Castanheda and Buchanan, no allusion to anything corresponding with the Sambandham and the elaborate ceremonies connected with it described by Mr. Chandu Menon is to be found in any of these works. If, during the lengthened period which elapsed between the earliest and the latest of these writings, it had been the custom for a Nayar lady to enter into Sambandham after the performance of certain prescribed ceremonies with a partner duly selected by and approved by the Karnavan of her tarwad and to remain faithful to him till such time as she or he felt anxious for a change when a fresh Sambandham was arranged with a new lover, it is not easy to understand how it came about that such a custom, differing so completely from the state of things described by them, never came under the notice of any of these travellers.

Whatever view be taken as to Sambandham among Nayars it is difficult to see how the sexual connection between a Brahman male and a Nayar female can be characterised as anything better than concubinage. The following extract gives the opinion arrived at by the Malabar Marriage Commission as to these connections in so far as the male partners in them are concerned :—

"On the Nambudri men the effect of the system has been pernicious. Instead of taking the lead in every intellectual pursuit, as do the Brahmans in other parts, the Nambudris have become enervated to such an extent that it would be difficult to find more than a few who have mastered the grammar and syntax of the Sanskrit which is the vehicle of their sacred texts. Most of them get no farther than committing a number of slokas to memory. Not only do they refuse altogether to tread the path of knowledge opened up to them by Government, but it is rare to find one of them who has studied the literature, such as it is, of his own vernacular" (*a*).

I find from Mr. Sturrock's Manual of South Canara that among the castes in that District who follow the Aliya Santana rule of inheritance, illicit connections between the women of such castes and Brahmans are unknown. He writes :—"There is nothing in South Canara analogous to the advantage said to have been taken of old polyandrous habits in parts of Malabar by certain classes of Brahmans, who, in their relations with Sudra women, are believed to have abused their reputation for superior sanctity" (*b*).

It may be mentioned that, in an Account of a Voyage to the East Indies undertaken between 1774 and 1781 by Monsieur Sonnerat, it is stated that at one time the Portuguese were permitted to initiate the Nambudris in these illicit connections. He writes as follows :—

"These Brahmans also do not marry but have the privilege of enjoying all the Nairesses. This privilege the Por-

(*a*) Report of the Malabar Marriage Commission, p. 9.

(*b*) Manual of South Canara, Vol. I., p. 142.

tuguese, who were esteemed as a great caste, obtained and observed till their drunkenness and debauchery betrayed them into a commerce with all sorts of women" (*a*). To what extent these allegations are true it is not easy to say.

The question as to whether a Marumakkathayam Sambandham has any of the characteristics of a legal marriage has never, as far as I can discover, been in any manner adjudicated on by the High Court, although the legal nature of similar sexual unions among followers of Aliya Santana system has been discussed in several decisions (*b*). In one of the most important of these judgments it was held (Scotland, C. J., and Ellis, J.) that the relation between a so-called husband and wife under the Aliya Santana law was "in truth not marriage but a state of concubinage into which the woman enters of her own choice and is at liberty to change when and as often as she pleases. From its very nature then it might be inferred as probable that the woman remained with her family and was visited by the man of her choice; but the case in this respect is not left to mere probability. Such has undoubtedly been the invariable habit under the Marumakkathayam law, and, although women in Canara under the Aliya Santana system do, it seems in some instances, live with their husbands, still there is no doubt that they do so of their free-will, and that they may at any time rejoin their own families" (*c*).

(*a*) A Voyage to the East Indies and China performed by order of Louis XV. between the years 1774 and 1781 by Monsieur Sonnerat, Commissary of the Marine, translated from the French by Francis Magnus, Vol. II., p. 24 (Calcutta 1788).

(*b*) In Queen-Empress *v.* Basava (I. L. R., XV Madras, 75) Parker, J. observes that in Malabar there is no legal marriage. This remark must be looked on as a mere *obiter dictum*. No question as to the effect of a Marumakkathayam Sambandham was then before the Court. It is impossible to believe that the learned Judge meant to lay down that it was impossible for any one in Malabar, *e. g.*, a Nambudri, to contract a legal marriage.

Subba Hegadi *v.* Tongu (IV Madras H. C. R., 196).

It will be found that this decision, as well as those in Munda Chetti *v.* Timmaju Hensu (*a*), Thimmappa Heggade *v.* Mahalinga Heggade (*b*), and even in Devu *v.* Deyi (*c*), which was passed as recently as 1885, are based to a great extent on a book termed Aliya Santanada Kattu Kattale, which was alleged to be the work of Bhutala Pandiya who, according to Dr. Whitley Stokes, the learned scholar who edited the first volume of the Madras High Court Reports, lived about A.D. 78 (*d*), but which in reality is a very recent forgery compiled about 1840. As to this, Dr. A. C. Burnell observes as follows in a note in his law of Partition and Succession :—

"One patent imposture yet accepted by the Courts as evidence is the Aliya Santanada Kattu Kattale, a falsified account of the customs of South Canara. Silly as many Indian books are, a more childish or foolish tract it would be impossible to discover; it is as about as much worthy of notice in a law court as 'Jack the Giant Killer' That it is a recent forgery is certain." * * *

"The origin of the book in its present state is well-known; it is satisfactorily traced to two notorious forgers and scoundrels about thirty years ago, and all copies have been made from the one they produced. I have enquired in vain for an old manuscript and am informed, on the best authority, that not one exists. A number of recent manuscripts are to be found, but they all differ essentially one from another. A more clumsy imposture it would be hard to find, but it has proved a mischievous one in South Canara, and threatens to render a large amount of property quite valueless. The forgers knew the people they had to deal with, the Bants, and by inserting a curse that families which do not follow the Aliya Santana shall become extinct, have effectually prevented an application for legislative interference, though the poor superstitious folk would willingly (it is said) have the custom abolished" (*e*).

(*a*) I Madras H. C. R., 380.
(*b*) IV Madras H. C. R., 28.
(*c*) I. L. R., VIII Madras, 353.
(*d*) I Madras H. C. R., 384, note.
(*e*) The law of Partition and Succession from the text of Varadaraja's Vyavaharanirnaya by A. C. Burnell, C. S. (1872), p. 12, note.

From an extract from a letter from Dr. Burnell, written in 1873 and referred to in the decision in Devu *v.* Deyi, it will be seen that this forged treatise was never produced in the Courts till 1843 (*a*).

The most important decision of the High Court bearing on the question now under consideration is that passed in 1883 (Turner, C. J., and Muttusami Aiyar, J.,) in Koraga *v.* the Queen. That was an application to the High Court to revise the proceedings of the District Magistrate of South Canara (*b*), who had in appeal confirmed a decision of a Sub-Magistrate who had convicted the petitioner under s. 498 of the Penal Code of the offence of enticing and taking away a married woman, notwithstanding that both she and the petitioner were governed by the Aliya Santana law. The Chief Justice, in setting aside the conviction, observed as follows :—

"We have considered the evidence recorded in this case, and are of opinion that it is not sufficient to prove that the cohabitation of a man and woman under the Aliya Santana law constitutes such a marriage as is intended in those sections of the Penal Code which provide for the punishment of offences against the marriage right. That the Aliya Santana law did not recognize such cohabitation as marriage appears to be shown by the circumstance that it founds upon it no rights of property or inheritance. The authority of the treatise attributed to Bhutala Pandiya has been seriously impugned."

"The customary cohabitation of the sexes under Aliya Santana law appears to us to do no more than create a casual relation, which the woman may terminate at her pleasure, subject, perhaps, to certain conventional restraints among the more respectable classes, such as a money payment and the control of relations, etc., which may be prescribed as a check upon capricious conduct. In the absence, however, of very clear evidence of custom, which, if well founded, must be a

(*a*) I. L. R , VIII Madras, 353.

(*b*) Mr. Sturrock. His judgment is printed in the report and is well worth perusal.

matter of general notoriety, we must adhere to the opinion expressed by this Court in Subbu Hegadi *v.* Tongu" (*a*), (*b*).

It will be remarked that the learned Chief Justice, although he points out that the authority of the treatise attributed to Bhutala Pandiya had been seriously impugned, yet bases his decision mainly on the ruling of the High Court in Subbu Hegadi *v.* Tongu (*a*), the grounds of which it will be found were almost entirely derived from a consideration of that treatise. It is unfortunate that this case was not argued before the learned Judges.

It happened that while the Marriage Commission was holding its sittings in the Malabar District, the following case came before the Courts. A follower of the Marumakkathayam system prosecuted to conviction a man before the Palghat Taluk Magistrate on a charge of house-breaking by night in order to commit theft. The Head Assistant Magistrate (Statutory C. S., an east coast Brahman), before whom the case came on appeal, reversed the decision on the ground that the man had entered the house not to steal but in order to carry on an intrigue with a woman who was living with the prosecutor as his wife. He held that, as it was impossible for a person bound by the Marumakkathayam law to contract a legal marriage, the appellant had committed no offence. I was then Sessions Judge of South Malabar, and, in the hope of getting a decision from the High Court on this question, I referred the judgment of the Head Assistant Magistrate to them making the following observations :—

"It will be remarked that the Head Assistant Magistrate finds that the appellant entered the house of the complainant with the object and intention of having intercourse with a woman who is throughout the proceedings termed the wife of the complainant. He, however, reverses the conviction recorded by the Lower Court for an offence under s. 456 of the

(*a*) IV Madras H. C. R., 196. (*b*) I. L. R., VI Madras, 374.

Penal Code for the following reason as set forth by him in his judgment. The complainant and the woman are both Nayars and, as the law does not recognise their intercourse as a valid marriage, it is obvious that the appellant could not be convicted of having gone to commit adultery as it is understood in the Penal Code"

"No evidence was, it appears, taken in this case as to the relation in which the complainant stood to the woman Lakshmi whom he terms his wife. In the absence of such evidence the Head Assistant Magistrate was not, in my opinion, justified in assuming that they were not man and wife. He is, it appears to me, mistaken in stating that, as the complainant and the woman were Nayars, the law does not recognise their intercourse as a valid marriage. I believe I am right in saying that it has never been held by the Madras High Court in any reported decision that a Nayar man and woman cannot enter into a valid marriage contract. It is no doubt the case that it has been decided that, in the absence of very clear evidence of custom, the cohabitation of a man and woman under the Aliya Santana system cannot be considered marriage so as to render punishable under s. 498 of the Penal Code a person who entices away the woman with the intents specified in that section (I. L. R., 6 Mad., 374). This decision cannot, however, in my opinion, be held to settle the question now under consideration for, although the Aliya Santana system of South Canara and the Marumakkathayam of Malabar are in many respects similar, they are, I believe, by no means identical."

"In the case of a prosecution for the offence of adultery under s. 497 proof of marriage is required and similar proof would no doubt be necessary where in charging an offender under s. 456 the offence in order to commit which the house is alleged to have been entered is stated to be that of adultery. The Head Assistant Magistrate might, I think, have in the present case found that there was not sufficient evidence on the record to show that a valid contract of marriage subsisted between the complainant and the woman whom he termed his wife and sent back the case for the purpose of further evidence being taken on the point, but he was not, I consider, justified

in holding that it was impossible that the parties could be man and wife and on that ground reversing the decision appealed against."

"The High Court, as I have already pointed out, have never judicially decided that it is impossible for a Nayar to contract a valid marriage and many leading members of the Nayar community strenuously deny that such is the case."

This reference, however, had no result as the High Court (Parker and Wilkinson, JJ.) declined to order further enquiry (*a*.) It is, in my opinion, to be regretted that an opportunity was not taken to arrive at a decision, after full and careful enquiry, as to what the law on this subject actually is.

In an able memorandum furnished by Mr. Brodie, who was then Collector of South Canara, to the Malabar Marriage Commission, and printed in one of the appendices to the report, a description will be found of the extent to which in that district the denial of the legal rights of a "husband" to the Aliya Santana "husband" has led to the commission of grave crime. As he observes "so long as the law, whilst declaring the husband bound to maintain the wife so long as she continues to reside with him (*b*), also declares that he has no legal right during that period to fidelity on her part (which is surely unreasonable), we can only expect that the husband, if wronged, will take the law, in the absence of any legal remedy, into his own hands" (*c*).

The following observations by Mr. Justice Muttusami Aiyar, in a memorandum annexed to the report of the Malabar Marriage Commission, on the question as to

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(*a*) Order in Criminal Revision case No. 119 of 1891 referred for the orders of the High Court under s. 438, C. P. C., by the Sessions Judge of South Malabar in his letter, dated 9th April 1891, No. 81, Criminal.

(*b*) Subbu Hegadi *v.* Tongu (IV Madras H. C. R., 196).

(*c*) Memorandum by Mr. Brodie, appended to the Report of the Malabar Marriage Commission, para. 15, p. 5.

whether it follows that, because a Marumakkathayam Sambandham has few of the incidents of a legal marriage, it must therefore be looked as concubinage pure and simple are worthy of consideration :—

"That, prior to the introduction of 'Pudamuri' and other species of Sambandham (forms of individual marriage), the sexual relation was of a fugitive character and that there was no marriage in the proper sense of the term, is not denied. But the question is not as to the primitive theory of sexual relation, but as to whether, as stated by the Honourable Mr. Sankaran Nayar when asking for leave to introduce his Bill, there is at present a marriage in practice, and, if so, whether the customs relating thereto are such as would furnish a basis for legislation. As I read the report, this position does not seem to be disputed; for, referring to the Marumakkathayam Hindus, the report states that 'they are all or nearly all of them better than their custom, and the majority (as we are told and believe) cleave to one woman for life.' Again, referring to the ancient notion that chastity was not a virtue prescribed for Nayar women and that 'they were specially created for the Numbudri bachelors to play with,' the report adds that 'Nayars will not submit to this teaching much longer.' The very same evidence, from which the above conclusions are drawn, associates the improvement in the relation of the sexes with Pudamuri and other species of Sambandham. It is clear, then, that in the course of social progress the majority of the Marumakkathayam Hindus have engrafted forms of marriage on their ancient practice, that these forms are resorted to as overt acts whereby the intention to marry is manifested, and that the sexual relation thus constituted in the majority of cases endures for life. This being so, the point for consideration seems to be, whether it is legislation on the customary basis or on the basis of the Brahmo Marriage Act (the so-called undenominational Law) that will, by enlisting the sympathies of the people, more effectually help on social progress. The report, however, overlooking this consideration, mixes up notions of the ancient polyandry with the present social marriage customs and does not discriminate between a legal marriage and a social marriage.

Further, by introducing other side issues, the report throws a cloud over the relations of the sexes as it now exists and states that 'Marumakkathayam was and still is destitute of the institution of marriage.' If the marriage customs are so bad as to render the sexual relation sanctioned by them nothing better than what it was in the primitive stages of the Marumakkathayam society, how are we to account for the admitted improvement in its moral tone, and how can legislation on the rigid lines of the alternative scheme be recommended? Our colleague, Mr. Chandu Menon, in his interesting Memorandum, describes the marriage customs in detail, and they are accepted in the report as accurate. But the report states that, because a Nambudri Brahman who goes through 'Pudamuri' does not consider it a marriage binding upon him, therefore it cannot be regarded as marriage in any other case. A Brahman may not look upon any marriage other than Vedic as binding upon him; but that is no sufficient reason for concluding that, as between Nayars, it is not regarded as binding either. On the other hand, that the Nambudri Brahmans themselves are compelled to go through the same formalities of wedding proves that, owing to social progress, the Nayar women insist on giving the union the character of a marriage."

The evidence that I have set out in this chapter seems to me to prove beyond all reasonable doubt that, from the sixteenth century at all events and up to the early portion of the nineteeth century, the relations between the sexes in families governed by Marumakkathayam were of as loose a description as it is possible to imagine. The Tali-Kattu-Kalyanam, introduced by the Brahmans, brought about no improvement and indeed in all probability made matters much worse by giving a quasi-religious sanction to a fictitious marriage which bears an unpleasant resemblance to the sham marriage ceremonies performed among certain inferior castes elsewhere as a cloak for prostitution. As years passed, some time about the opening of the nineteenth century, the Kerala Mahatmyam and Keralolpatti were concocted, probably by Nambudris, and false and pernicious doctrines as to the obligations laid on the

Nayars by divine law to administer to the lust of the Nambudris were disseminated abroad. The better classes among the Nayars revolted against the degrading system thus established and a custom sprang up, especially in the more respectable tarwads in North Malabar, of making Sambandham a more or less formal contract, approved and sanctioned by the Karnavan of the tarwad to which the lady belonged and celebrated with elaborate ceremonies under the Pudamuri form, as described by the late Mr. Chandu Menon. That there was nothing analogous to the Pudamuri prevalent in Malabar from A.D. 1550 to 1800 may, I think, be fairly presumed from the absence of all allusion to it in the works of the various European writers to which I have referred in this chapter. Even if, however, it be granted that the efforts which we now find are being made in all respectable tarwads to make Sambandham something very different from the loose customs generally prevalent up to the commencement of the nineteenth century, and perhaps even later, did not begin to have any real effect till within comparatively recent years, it appears to be a matter for consideration as to whether courts of law are bound to refuse to admit that the Pudamuri as now performed is absolutely void of all legal significance whatever and that the relation between the Sambandhakaran and the lady sanctioned by it is from a legal point of view nothing more than concubinage.

The following remarks of Mr. Sturrock, C.S., regarding the Tulu people of South Canara, a district in which he served for over thirteen years are, I believe, applicable, *mutatis mutandis*, to the Nayars of Malabar.

"Amongst the Tulu people, a woman retains after marriage something of the power which in European countries she exercises during courtship, and is allowed to practically divorce her husband as readily as a Muhammadan can divorce his wife, or a Hindu take a second wife without giving freedom to the first. The laws of property and inheritance are also

entirely independent of the marriage laws, and this fact, together with the independence enjoyed by married women, has led English and Hindu judges to decide that there is no marriage amongst the Tulu people, a decision which has naturally led to some heart-burning, amongst those who attach importance to English and Hindu ideas on these subjects. The great mass of the people continue to follow the ancient marriage rules and lead domestic lives undisturbed by the fact that other people, with other ideas, consider that they are not married at all" (*a*).

Attention may also be drawn to the same writer's views as set out in the South Canara Manual. He writes :—" The propriety of the common idea of the comparative immorality of the Tulu marriage customs seems either to be based on a misapprehension of facts or to depend upon the assumption that the morality of a people is inseparably bound up with a conventional Code which strives to preserve the chastity of one sex by the severest penalties while allowing the other the utmost latitude in the formation of either legalized or illicit connections. Amongst the poorer and lower Aliya Santana classes and castes the marriage ties and obligations are certainly of the loosest description but not one whit more so than amongst corresponding South Indian castes on the east coast in which property is vested in men and descends from father to son. Neither have shaken themselves free from habits dating from old polyandrous days and it is doubtful if the Sudra castes on the eastern coast can be said to be on the right track in endeavouring to combat them by the modern Brahmanical expedients of infant marriage and perpetual widowhood" (*b*).

In leaving this subject I believe that I may say with some confidence that, in case the legal effect, if any, of a

(*a*) Memorandum by Mr. J. Sturrock, I.C.S., printed with the report of the Malabar Marriage Commission.

(*b*) South Canara Manual, Vol. I., pp. 142, 143.

Sambandham among followers of the Marumakkathayam law ever does come under the consideration of the High Court, it will not be decided with reference to the doctrines of the Kerala Mahatmyam, the Keralolpatti or the Aliya Santanada Kattu Kattale. These books, of very recent origin, are a tissue of falsehood and it is much to be regretted that any importance has ever been attached to them by judicial officers. We indeed may say of the Kerala Mahatmyam, and the Keralolpatti as Dr. Johnson said of the poems ascribed to Ossian; "Copies are nothing. Where are the manuscripts? They can be shown if they exist but they never were shown." As to this I find the following in the Report of the Malabar Marriage Commission:— "The Kerala Mahatmyam is composed in Sanskrit verse and such copies of it as are known to exist are written on palm leaf in the Malayalam characters. The only copy which the commission were able to obtain was lent by a Nambudri dignitary and he informed the commission that this copy was made thirty-seven years ago from an older grantham (palm leaf book) which through age was becoming undecipherable and which is now lost. No information whatever is forthcoming as to the authorship of the poem or as to its date" (*a*). In short nothing more ancient than a thirty-seven year old copy could be produced.

The result of the deliberations of the Malabar Marriage Commission was the passing of Act IV. of 1896 (Madras) which is entitled "An Act to provide a form of marriage for persons following the Marumakkathayam or Aliya Santana Law" (*b*).

From the date on which the Act came into force up to the 4th September 1903, eighty-three Sambandhams have been registered. In his report on the working of the Act for the year 1898-99 the Registrar-General states that the number of notices of intention to register

(*a*) Report of the Malabar Marriage Commission, p. 10.

(*b*) Act IV. of 1896 (Madras) is printed in the appendix.

Sambandhams was thirty-six in 1896-97, twenty-four in 1897-98 and only fourteen in 1898-99. He accounts for the falling off as follows:—"The mass of the people continue to regard the Marriage law with aversion and suspicion, and even the educated members of the community, who are in favour of the measure, shrink from taking advantage of it, from fear of offending the elder members of their tarwads and the all-powerful Nambudris and other great landlords. The Registrar of Calicut also points out that the power conferred by the Marriage law to make provision for one's wives and children has hitherto acted as some inducement to persons to register their Sambandhams, but, as Act V. of 1898 (Madras), which came into force from 2nd September 1898, enables the followers of Marumakkathayam law to attain this object without registering their Sambandhams, and thus "unnecessarily curtailing their liberty of action and risking the chances of a divorce proceedings," he thinks it unlikely that registrations under the Marriage law would increase in future."

The figures furnished by the Registrar-General show that the Act has as yet had but little practical effect in Malabar or South Canara.

A question has been recently raised in Malabar as to whether a male who has formed Sambandham with a female can, when there have been children as a result of their union, escape the obligation placed by law under s. 488, C. P. C., on every person to maintain his children, whether legitimate or illegitimate.

In 1893 a Nayar woman applied to the Head Assistant Magistrate, South Malabar, for an order under s. 488 of the Code of Criminal Procedure, directing the counter-petitioner to pay her a monthly allowance for the maintenance of her child, of which she alleged that he was the father. In defence, the counter-petitioner denied his liability for maintenance, the petitioner being a woman of the Nayar caste.

The Head Assistant Magistrate referred to the petition as the first which had come to his notice of a woman of the Nayar caste claiming that the provisions of s. 488 should be put in force on behalf of her child and he therefore heard a considerable amount of evidence regarding the customs of that community, which he summarised as follows:—

"The recognised form of marriage among Nayars is known as 'Sambandham.' A Brahman may have Sambandham with a Nayar woman in the same way in which a Nayar can have it with a Nayar woman. Practice seems to vary in regard to the residence of the wife. Apparently a custom is gaining ground, akin to that prevailing in North Malabar, according to which the wife is expected to live in the husband's house. But this is certainly not the usual practice. The Sambandham can be dissolved at the will of either party, but, during its existence, the woman is expected to be faithful to her husband. In regard to the maintenance of the wife and children, in all the cases in which they live with the husband or father, the latter undertakes the liability of maintaining them; but, when they live in their own tarwad house, the husband is expected to give the extra expenses of his wife such as clothing, etc. The education of the children appears to be regarded as one of the duties of the father, but, in some cases, the expense is shared between the father and the Karnavan of the tarwad."

This being the recognised form of relationship among the Nayars, the Head Assistant Magistrate held that a child born during its continuance must be presumed to be the child of the man who was received and recognised as the husband; and on the evidence he found that the child for which maintenance was claimed was the child of the counter-petitioner. In considering the question of counter-petitioner's liability under s. 488 of the Criminal Procedure Code, he overruled the objection that an order under that section would affect the Marumakkathayam law as observed by the Nayar community. With reference to the words 'unable to maintain itself' in the section, it

was contended that the maintenance of the child being a charge upon the tarwad property, it was a matter for enquiry if the tarwad funds were insufficient for its support, and that the father's liability for maintenance could only arise if they were shown to be so insufficient. Having heard evidence on this point, the Acting Head Assistant Magistrate found that, if the means of the tarwad had anything to do with the liability of the father, the tarwad was too poor to take the responsibility of supporting the child. He, however, construed the phrase 'unable to maintain itself' to mean 'unable to earn its own livelihood.' In the result he held that the counter-petitioner was liable to maintain the child.

Against that order the counter-petitioner presented a petition to the High Court on the following grounds among others:—That s. 488 of the Criminal Procedure Code did not apply to the case; that taking the usage and custom of Nayars into consideration it could not be held to be proved that the counter-petitioner was the father of the child; that there could be no presumption that a child born during a Sambandham was the child of the Sambandhakaran; and that, the tarwad being according to the law and custom bound to maintain all the children of the family, no order for maintenance could be made against the father. When the matter came before the High Court (Collins, C. J., and Shephard, J.) it was held that, as the facts were found, there could be no doubt that the order was right and that there was no foundation for the suggestion that the law enacted as to maintenance by the Code of Criminal Procedure did not apply to Malabar (*a*).

(*a*) Ayya Pattar *v.* Kaliani Ammal, Criminal Revision Case No. 338 of 1893 (unreported but printed in a note at I. L. R., XXII Madras, 247). This decision has since been followed in Venkatakrishna Pattar *v.* Chimmukuttu (I. L. R., XXII Madras, 246). Reference may also be made to Kariyadan Pokkar *v.* Kayat Beeran Kutti (I. L. R., XIX Madras, 461).

CHAPTER IV.

RIGHTS AND OBLIGATIONS OF KARNAVANS.

The senior male member in a Malabar family is by law the Karnavan, and as such is the natural guardian of every member within the family. He alone can sue and be sued as the representative of the family. When, however, the Karnavan of a Malabar tarwad has not been impleaded as such in a suit and there is nothing on the face of the proceedings to show that it was intended to implead him in his representative character, tarwad property cannot be attached and sold in execution of the decree, even though it is proved that the decree is for a debt binding on the tarwad. A decree in a suit, in which the Karnavan of a tarwad is in his representative capacity joined as a defendant and which he honestly defends, is binding on the other members of the tarwad not actually made parties. The Karnavan for the time being has an almost absolute control over the distribution of the family income and the family expenditure. The Karnavan may delegate his powers of management, but he cannot, without the assent of those to whom the obligations are owing, *i.e.*, the members of the family generally, assign his rights and privileges so as to be unable to resume them. His powers of management may, however, be limited by contract.

As an exception to the general rule, in some few Nayar families, a custom exists by which the management is vested in the senior female in preference to the senior male member of the family. Such a custom, however, must be strictly proved.

The rights of the junior members of a Malabar family are the right of the males to succeed to the headship by

seniority, and the right of the males and females to be supported in the family house. A separate maintenance will not be allotted to a junior member who voluntarily and without lawful excuse separates himself or herself from the family.

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(1) The senior male member in a Malabar family is by law the Karnavan, and as such is the natural guardian of every member within the family. He alone can sue and be sued as the representative of the family. When, however, the Karnavan of a Malabar tarwad has not been impleaded as such in a suit and there is nothing on the face of the proceedings to show that it was intended to implead him in his representative character, tarwad property cannot be attached and sold in execution of the decree, even though it is proved that the decree is for a debt binding on the tarwad. A decree in a suit, in which the Karnavan of a tarwad is in his representative capacity joined as a defendant and which he honestly defends, is binding on the other members of the tarwad not actually made parties.

In a judgment delivered by the Provincial Court of the Western Division in 1813, which was affirmed by the Sudder Court (Scott and Greenway, JJ.) in A. S. 28 of 1814, the Court (Stevens and Clephane, JJ.) say :—

"In cases where the Marumakkathayam rule of inheritance prevails the property is considered indivisible, the management thereof and the collection of the rents and income being invariably vested in the senior male, on whom devolves the duty of providing for the support and maintenance, as far as the funds will admit, of the other branches of the family, especially of the women and children" (*a*).

In his report as Special Commissioner on the affairs of Malabar, dated 25th September 1852, Mr. Strange writes:—

"The theory of a Hindu family in Malabar is that the head thereof has entire control therein, that his signature alone can be taken for any exigencies of the family, for the due support of the whole of which he is responsible, and that the property is vested in him for the common good of all and is indivisible."

(*a*) Ambu and Kellu *v.* Ramanna Nambiar and Cannan, 1 Sudder Decisions, p. 118.

This opinion was endorsed by Mr. Conolly, the Collector of Malabar, in a letter written by him to Government on the 8th October 1853.

In a judgment delivered by the High Court (Morgan, C. J., and Holloway, J.) in Eravanni Revivarman *v.* Ittapu Revivarman, it is said :—

"The person to whom the Karnavan has the closest resemblance, is the father of a Hindu family. Like him, his situation as head of the family comes to him by birth. * * * The office is not one conferred by trust or contract, but is the offspring of his natural condition" (*a*).

And in his work on Hindu Law, Mr. Mayne writes :—

"In Malabar and Canara, where the property is indissoluble, the members of the family may be said rather to have rights out of the property than rights to the property. The head of the family is entitled to its entire possession and is absolute in its management. The junior members have only a right to maintenance and residence. They cannot call for an account, except as incident to a prayer for the removal of the manager for misconduct, nor claim any specific share of the income, nor even require that their maintenance or the fair outlay should be in proportion to the income. An absolute discretion in this respect is vested in the manager" (*b*).

Congenital blindness, deafness or dumbness, which would prevent a Karnavan from attending to his duties, incurable disease, such as leprosy (*c*), which would prevent him from having social intercourse with his neighbours, and insanity, are causes which disqualify a member of the family from succeeding to its headship, as they are causes which exclude a man from inheritance under Hindu Law. Kanaran *v.* Kunjan was a suit brought for the removal from the post

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(*a*) I. L. R., I Madras, 153.

(*b*) Mayne's Hindu Law, Sixth Edition, p. 359.

(*c*) In Chandu *v.* Subba it was held that under Aliya Santana Law there was no custom excluding lepers either from management of the family or from inheritance. I. L. R., XIII Madras, 209.

of Karnavan of a person who had become blind some years after he had succeeded to the office. The High Court (Collins, C. J., and Wilkinson, J.) held that the defendant was unfit to be Karnavan and removed him from the post (*a*). Where, however, in Ukkandan *v.* Kunhunni, a blind man sued as Karnavan to recover certain lands belonging to his tarwad and one of the defendants, who alleged that he had a Kanam right over the lands, urged that the plaintiff was disqualified by blindness from acting as Karnavan and suing to recover the land, the High Court (Subramanya Ayyar and Best, JJ.) held that the defendant was not entitled to raise this plea (*b*).

There are cases which go to the length of saying that a spendthrift and an incompetent person may be excluded from the post of manager, but it is difficult to see how such matters could be settled otherwise than by a suit for the removal of the Karnavan.

In Akamal *v.* Parvathi, the question was raised before Mr. Wigram whether, in the absence of male adults, the management of the tarwad would devolve on the senior female, or on the mother of the senior of the minor males as his guardian. Mr. Wigram decided in favour of the former but a contrary conclusion was arrived at by the Sub-Judge in a similar case. The High Court had the matter before them in second appeal but refused to decide it (*c*).

That the Karnavan is the natural guardian of every member within the tarwad was held by the High Court (Morgan, C. J., and Holloway, J.) in Thathu Baputty *v.* Chakayath Chathu. The judgment says :—

"In the present case, by the principles of the law of Malabar, the mother herself. while alive, and her children too, were under the guardianship of the head of the family, the Karnavan. Their position was precisely analogous to that of

(*a*) I. L. R., XII Madras, 307. (*b*) I. L. R., XV Madras, 483.
(*c*) S. A. 346 of 1878.

the members of a Roman family under the *patria potestas*. The Karnavan is as much the guardian and representative, for all purposes of property, of every member within the tarwad, as the Roman father or grandfather."

"Moreover the relation of husband and wife does not in Malabar disturb their condition. These children have no claim whatever upon the property of their father, but their rights are entirely in that of their Karnavan's family. There is no doubt at all that the Karnavan was, during the mother's life-time, and continues to be after her death, the legitimate guardian of these children, and that the father has by positive law not the smallest right to their custody" (*a*).

As to right of the Karnavan to decide what family ceremonies are, and what are not, obligatory, reference may be made to the judgment of the District Judge of South Malabar in Kutti Ammamen *v.* Virgathen Mahadevi. It was there held that *primâ facie* the managing member is the proper person to determine the question, and that junior members could only dispute his authority if the non-performance of the ceremonies involved social disgrace and this decision was confirmed by the High Court on appeal (*b*).

The Karnavan is *primâ facie* the only person who can represent the family in suits. As remarked by Mr. Holloway in his judgment in A. S. 120 of 1862 (Tellicherry), "a Malabar family speaks through its head and in Courts of Justice, except in antagonism to that head, can speak in no other way."

If a decree is obtained against the Karnavan, it will, in the absence of fraud or collusion, bind the other members. This was decided by the High Court (Kernan and Kindersley, JJ.) in Varanakot Narayanan Namburi *v.* Varanakot Narayanan Namburi. After discussing the position of the Karnavan of a Malabar family (in this case it was a Nambudri family), and expressly ruling that a Karnavan is not

(*a*) VII Madras H. C. R., 179.

(*b*) S. A. 117 of 1880.

a mere trustee and that the rules of Courts of Equity, as to the necessity of making *cestui-que-trusts* parties to suits against trustees by strangers, are inapplicable, the judgment concludes :—

"The Karnavan has been sued as Karnavan and defended on the ground that the land was the janmam of his illam. He was not sued in his individual capacity, and the Kanam under which it was decided he held the lands was granted to a former Karnavan and came by descent to be managed by him. It appears to us that appellant claims, within the meaning of s. 13 of the Civil Procedure Code, under the first respondent, and that the matter directly and substantially in issue in this suit was directly in issue in a former suit between the second respondent and the first respondent, and that plaintiff's claim in this suit is barred by s. 13" (*a*).

The judgment in the same case contains a summary of the duties and powers of a Karnavan which it will not be out of place to quote here :—

"Under Malabar Law, the eldest male member of the tarwad is the Karnavan. In him is vested actually (though in theory in the females), all the property, moveable and immoveable, belonging to the tarwad. It is his right and duty to manage alone the property of the tarwad, to take care of it, to invest it in his own name (if it be moveable) either on loans on Kanam or other security, or by purchasing in his own name lands, and to receive the rent of the lands. He can also grant the land on Kanam by his own act or on Otti mortgage. He is not accountable to any member of the tarwad in respect of the income of it, nor can a suit be maintained for an account of the tarwad property in the absence of fraud on his part. He is entitled in his own name to sue for the purpose of recovering or protecting property of the tarwad. None of the acts in relation to the above matters can be legally questioned if he has acted *bonâ fide*. If any of his acts have been done *malâ fide*, they can be questioned by the members of the tarwad, and he may be removed for *mala fides* in his acts or for incompetency

(*a*) I. L. R., II Madras, 328.

to manage and other causes. He is interested in the property of the tarwad, as a member of it, to the same extent as each of the other members. All the members, including the Karnavan, are entitled to maintenance out of the tarwad property. His management may not be as prudent or beneficial as that of another manager would be, but, unless he acts *malâ fide* or with recklessness or with incompetency, he cannot be removed from such management. Almost the only restraint on him in such management is that he cannot alienate the lands of the tarwad.

In Kombi Achen *v.* Lakshmi Amma the High Court (Innes and Muttusami Aiyar, JJ.), reviewing the decision in Varanakot Narayanan Namburi *v.* Varanakot Narayanan Numburi (*a*), stated that it was an authority for the proposition that a decree against the Karnavan, the recognised manager of the property, in respect of which he is sued, when the suit has been *bonâ fide* defended on behalf of the other members of the tarwad, is binding on them, but that it was not an authority for the proposition that a decree against a Karnavan, in a suit against him to recover a mere debt, is binding on the tarwad in the absence of fraud or collusion.

The learned Judges in the same decision discuss the question as to the procedure which should be adopted when it is sought to make a decree in a suit binding on a Malabar tarwad. They observe as follows :—

"If it is sought to make a decree in a suit binding on a corporate body, it should be sued as such corporate body in the mode required by the Code of Civil Procedure, and the decree, to be binding on it, should declare the liability of the corporate body. If a tarwad does not strictly fall within the denomination of a corporation (Chapter XXIX, Civil Procedure Code) Sec. 30 of the Code, in cases in which the members of the tarwad were numerous, would at all events apply, which, while authorising one of the persons interested to defend by leave of the Court on behalf of all, requires notice of the institution of the suit to

(*a*) I. L. R., II Madras, 328.

be given to all; and a decree in such case, it is presumed, would be a decree against the entire body defending by such person. By s. 235, in proceeding to execute the decree, the decree-holder must state, among other particulars, the names of the parties and the name of the person against whom the enforcement of the decree is sought. It is obvious that the execution of the decree applied for is intended to be limited to the person or persons so named, and it is not contemplated that enforcement should be effected against persons against whom the decree has not been passed, or to whom due notice, at all events, under s. 30 has not been given" (*a*).

This difficult question came constantly before the Courts and led to conflicting decisions. The result was a reference to a Full Bench of the High Court in 1885 when it was held (Turner, C. J., Kernan, Muttusami Aiyar, Hutchins and Brandt, JJ.) as follows:—

"In these cases the following question has been raised. Under what circumstances will a decree passed against a Karnavan of a Malabar tarwad be binding on the other members of the tarwad who may not have been made parties to the suit, so that a sale in execution will convey the rights of the tarwad in the property sold in execution to a purchaser?"

"The customary law of Malabar vesting in the senior male or Karnavan the management of the family property, an error unfortunately crept into the procedure adopted by the Courts of Malabar, and it was considered not only that a Karnavan might sue alone on behalf of the tarwad, but that he might be impleaded alone as representing the tarwad. Indeed, the practice seems to have gone further, and it has been supposed that a decree obtained against a person who filled the position of Karnavan would bind the tarwad, although he was not impleaded as Karnavan, and although there was nothing on the face of the record to show that it was the intention of the parties that he should be sued in a representative character. Similarly, it has been the practice to treat a decree obtained against a person holding the position of Karnavan as a decree against the tarwad, of

(*a*) I. L. R., V Madras, 201.

which he was the managing member, and to bring to sale in execution of it tarwad properties, although there was nothing on the face of the proceedings to indicate the liability of the tarwad or that the judgment-debtor had been impleaded as representing it. In Kombi Achan *v.* Lakshmi Amma (*a*), this Court pointed out that, in order to bind the members of a tarwad, the proper procedure was to implead all of them, though, in cases in which the members of the tarwad were numerous, advantage might be taken of the provisions of the Code of Civil Procedure which enabled the plaintiff to bring before the Court certain persons to represent themselves and others having a similar interest in the subject of the litigation. It is very possible that the error in procedure to which we have adverted had its origin in the inconvenience of impleading so numerous a body as frequently constitutes a Malabar tarwad, of whom some may be minors and some may reside at a considerable distance from the tarwad house. Nevertheless, when it is sought to bind persons by a decree or by an order made in execution of a decree, some grounds must be shown to justify the imposition of the obligation. Ordinarily no persons are bound by a decree who are not parties to the suit or proceedings, or who do not claim through or under persons who are parties to the suit or proceedings. The Privy Council has nevertheless recognised that, for certain purposes, the manager of a Hindu family sufficiently represents all the members of a family, if it appears on the face of the proceedings that he has been impleaded in that character."

"This is no doubt a concession to the inexperience in pleading which attended the constitution of regularly organised Civil Courts in this country, and to the extent to which the ruling of the Privy Council in the case to which we have alluded (Bissessur Lall Sahoo *v.* Maharajah Luchmessur Singh) (*b*), authorises us to go, the circumstances of the Courts of Malabar appear to us to require us to go. But we cannot go further. No doubt it inflicts some hardship on a plaintiff who has obtained a decree against a person holding the position of a Karnavan, in the belief that he has thereby secured a remedy against the tarwad, to find that his decree is imperfect; it is

(*a*) I. L. R., V Madras, 201. (*b*) L. R., 6 I. A., 233.

greater hardship on a purchaser at an auction-sale held in execution of a decree of Court that he should find that the sale is not binding on the tarwad. But, inasmuch as the recent amendment of the Procedure Code has declared that a sale in execution may be set aside where nothing passes by it, and in a sale in execution of a decree passed against a person who is the Karnavan, but is not impleaded in that character, no interest in tarwad property could be conveyed, the purchaser will not be greatly injured. On the other hand, it would be extremely hard to hold that the members of a tarwad are bound by a decree or sale where they are not parties to the suit or proceedings, and where there is nothing to show that it was the intention of the person who procured the decree or sale to seek any remedy against them or to affect their interests. For this reason it was held, in Haji *v.* Atharaman (*a*), that where a suit was brought against a person who was Karnavan of a tarwad, but who was not impleaded as such, nor was the debt alleged to be a tarwad debt, a sale in execution of the decree would not bind tarwad property. It must of course be understood that where the members of a tarwad are not parties to the proceedings and have not been represented in the manner prescribed by the Code, they are not stopped from showing that the debt was not a tarwad debt" (*b*).

The ruling of the Judges that, even where the Karnavan was sued in his representative capacity, members of the tarwad, who were not parties to the proceedings and were not represented in the manner prescribed by the Code of Civil Procedure, were not estopped from showing that a debt for the recovery of which a decree had been passed was not binding on their tarwad, was found to work in by no means a satisfactory manner, to give rise to unnecessary litigation and to afford great encouragement to junior members of tarwads to file fraudulent suits with the hope of being able to shield tarwad property from liability on account of proper tarwad debts justly due. The question came before the High Court constantly, and eventually a Bench of two Judges referred the following question to a

(*a*) I. L. R., VII Madras, 512. (*b*) I. L. R., VIII Madras, 484.

Full Bench :—" Whether the decree made in a suit in which the Karnavan of a Numbudri illam or a Marumakkathayam tarwad is, in his representative capacity, joined as a defendant and which he honestly defends, is binding on the other members of the family not actually made parties." This question was decided by the Full Bench (Collins, C. J., Shephard, Subramania Ayyar and Davies, JJ.) in the affirmative (*a*). Mr. Justice Shephard, in a judgment in which the other learned Judges appear to have concurred on the whole, has gone into this most important question so fully and has reviewed so thoroughly the prior decisions that I am of opinion that the best manner in which the law on the subject as it stands at present can be set forth is by quoting his judgment which is as follows :—

"The question raised by the reference is one of considerable importance. Since 1880 it has constantly been discussed in this Court. Different views have been propounded, and it would not be easy to reconcile all the decisions. I propose first to examine these decisions and afterwards to consider the question from other aspects, and also with reference to the arguments which are urged against the admission of the principle that a Karnavan can properly represent his tarwad in suits professedly brought by, or against, the tarwad.

"In Varanakot Narayanan Namburi *v.* Varanakot Narayanan Namburi (*b*), the senior member of an illam had been sued as such for the recovery of land alleged by him to belong to the illam. A decree having been passed against him, a junior member of the illam, alleging fraud, sued for a declaration with regard to the same land as against the plaintiff in the first suit. It was held that the junior was properly represented by his senior in the first suit, and that therefore, having failed to prove fraud, he could not succeed in the second suit. In Kombi Achan *v.* Lakshmi Amma (*c*) a decree for money had been obtained against the Karnavan and a suit was brought by

(*a*) Vasudevan *v.* Sankaran, I. L. R., XX Madras, 129.

(*b*) I. L. R., II Madras, 328. (*c*) I. L. R., V Madras, 201.

the Anandravan to set aside the sale in execution of the decree. It does not seem to have been proved that the Karnavan was sued or sought to be made liable otherwise than in his personal capacity The Court distinguished the case of a debt from the case of land such as was under consideration in Varanakot Narayanan Namburi *v.* Varanakot Narayanan Namburi (*a*). It held that the junior members were entitled to a decree on the creditors failing to prove that the debt was properly incurred for the purposes of the tarwad. It was in effect said that if the creditor intended to make the tarwad liable he ought to have made them parties or applied under s. 30 of the Code.

"In Vasudevan *v.* Narayana (*b*), Mr. Justice Innes, who was a party to the last decision, expresses the same view again. That was a case in which a member of an illam, apparently the eldest, was defeated in a suit brought against him for redemption of certain land. In a second suit brought by his brother to recover the same land, it was held by Innes, J., that, although no fraud was alleged, the brother was not bound by the former decree. Mr Justice Kernan, who had taken part in the judgment in Varanakot Narayanan Namburi *v.* Varanakot Narayanan Namburi (*a*), considered that it was unnecessary to decide the question whether the case of a Malabar tarwad was an exception from the ordinary rule that all persons sought to be affected by a suit should be made parties to it. The learned Judges agreed that the case was distinguishable from that in Varanakot Narayanan Namburi *v.* Varanakot Narayanan Namburi (*a*). With all deference, I must say that, assuming that the elder brother in Vasudevan *v.* Narayana (*b*) was sued in his representative capacity, I can see no material distinction between the two cases. The circumstance that, in the earlier case, the plaintiff alleged fraud and left it to be assumed that otherwise he was bound by the decree, is suggestive as indicating the opinion entertained by him and his advisers as to the position of the head of a Malabar family. But I do not understand why, because he failed to prove the alleged fraud, he should not have had relief on the simple ground that he was not duly represented in the former suit, if that ground was considered tenable. It appears to me

(*a*) I. L. R., II Madras, 328. (*b*) I. L. R., VI Madras, 121.

that the judgment in Varanakot Narayanan Namburi *v.* Varanakot Narayanan Namburi (*a*) was clearly intended to show that that ground was not tenable. In Thenju *v.* Chimmu (*b*) the two extreme views are stated: First, 'a judgment is only binding *inter partes* and the judgment against the Karnavan is in no case binding on the Anandravans'; second, 'a Karnavan is the head and representative of the family, and the judgment against him binds the Anandravans unless he was guilty of fraud or collusion.' It was not necessary in that case to attempt a reconcilement of the decisions.

"In Haji *v.* Atharman (*c*) it appears to have been assumed that a decree against the Karnavan for a debt alleged to be the tarwad debt was binding on the tarwad. There was no actual decision. In Ittiachan *v.* Velappan (*d*) the question came before a Full Bench with reference to decrees for debt. The question stated in the judgment was as follows:—'Under what circumstances a decree passed against a Karnavan of a Malabar tarwad will be binding on the other members of the tarwad who may not have been made parties to the suit, so that a sale in execution will convey the rights of the tarwad in the property sold in execution to a purchaser?' As might have been expected no definite answer was given to this question. The general effect of the observations made in the first part of the judgment seems to be that, in the opinion of the Court, the admitted practice of treating the Karnavan as a sufficient representative of the tarwad was not strictly regular, but that notwithstanding it must be tolerated within certain bounds In dealing with the particular cases under reference, the Court treated the circumstance that the Karnavan had or had not been sued in his representative character as the cardinal point on which to decide whether or not the tarwad was bound by the decree. The next case, Sri Devi *v.* Kelu Eradi (*e*), is of importance because in deciding it the Court considered the Full Bench decision and acted upon their view of it. At the same time it must be said that, having regard to the facts found by the District Judge, the

(*a*) I. L. R., II Madras, 328.
(*b*) I. L. R., VII Madras, 413.
(*c*) I. L. R., VII Madras, 512.
(*d*) I. L. R, VIII Madras, 484.
(*e*) I. L. R., X Madras, 79.

observations made on the general question of the force of decrees against a Karnavan were not strictly necessary. The District Judge on appeal held that the Karnavan had, in the first suit in which he was impleaded as defendant, fraudulently admitted the plaintiff's title. But the Court decided the case on the ground that apart from fraud the Anandravans were entitled, notwithstanding the decree, to have the question of title examined and to show that the decree was erroneous in point of fact. They considered that they were precluded by the Full Bench decision from holding that the Anandravans were bound by the decree against their Karnavan unless they proved *mala fides* on his part.

"The next case, Subramanyan *v.* Gopala (*a*), was heard by a Court composed of the same Judges as those who took part in the last cited case. This case differs from the former cases in the circumstance that the manager of the family had figured as plaintiff in the former suit. It was found that she had sued, not on her own account, but on behalf of the tarwad and that she had contested the suit honestly and with due diligence. On this finding, returned in answer to questions sent down by the Court on the first hearing of the second appeal, the Court dismissed the suit brought by the junior members of the tarwad, founding their judgment on the fact that the manager had been the plaintiff in the first suit and thus distinguishing the case from Sri Devi *v.* Kelu Eradi" (*b*).

"Some other cases were cited, but they have no immediate bearing on the point now under discussion. One negative proposition is clearly established by the cases to which I have referred—a decree made against a Karnavan is clearly not binding on the tarwad, unless he sued or was sued in his representative character. It is also difficult to avoid the admission that the cases justify this further proposition that, in some cases a decree against the Karnavan may be binding on the tarwad and unimpeachable save on the ground of fraud. This limited proposition is admitted in Subramanyan *v.* Gopala (*a*). The distinction there insisted upon I fail to understand or appreciate.

(*a*) I. L. R., X Madras, 223. (*b*) I. L. R., X Madras, 79.

If the tarwad may be adequately represented by their Karnavan in litigation promoted by him, I cannot see why they may not equally be represented by him in proceedings which are directed against the tarwad. The distinction between the case of the Karnavan sued for debt and the Karnavan sued for property is also, I think, one which cannot be maintained. It is suggested in the case in Kombi Achan *v.* Lakshmi Amma (*a*), but since then does not seem to have been insisted upon. I concede that distinctions founded on the nature of the right, or the way in which it comes to be litigated, may be material in considering whether the Karnavan really did represent the tarwad and honestly represent it; but otherwise I fail to see how they can be material. There are, it appears to me, only two alternatives. We must either hold that the status of the Karnavan has nothing in it to make a decree against him binding on the tarwad, or that, in all cases in which he is sued or sues in his representative character, the tarwad is bound, cases of fraud or collusion only being excepted. Having regard to the authorities already cited, I do not think we are precluded from affirming this latter proposition. The former proposition it would not be easy to reconcile with the Full Bench decision, which alone is binding on us."

"I will now consider the question apart from the recent cases and with reference to the position of Karnavan as understood in Malabar. I believe there can be no doubt that, prior to 1880, the theory that the tarwad was fully represented by the Karnavan was universally admitted (*see* Varanakot Narayanan Namburi *v.* Varanakot Narayanan Namburi (*b*), Kombi Achan *v.* Lakshmi Amma (*a*).) It is noteworthy that, as long as Mr. Justice Holloway, who was intimately acquainted with Malabar Law, was in this Court, the theory does not seem to have been questioned." * * *

"It is unnecessary to repeat at length what has been said in several cases as to the rights and duties of the Karnavan. He is the manager of the tarwad property; he is entitled to possession of it even against the Anandravans; he is authorised, subject to certain limitations, to alienate the family property

(*a*) I. L. R., V Madras, 201. (*b*) I. L. R., II Madras, 328.

and to pledge the credit of the family. He cannot be removed from office at the instance of the junior members and dispossessed of the family property, except on proof of gross maladministration. Apart from this, the junior members have no other claim against him except for maintenance. No claim for division of the property is admissible (Eravanni Revivarman *v.* Ittapu Revivarman (*a*), Varanakot Narayanan Namburi *v.* Varanakot Narayanan Namburi (*b*), Tod *v.* Kunhamod Hajee (*c*), Kannan *v.* Tanju (*d*).) If the Karnavan being so placed with regard to the tarwad, was, for many years prior to 1880, universally regarded as the person through whom the tarwad should speak in Courts of Law and was so treated by the Courts, the remaining question is whether the Code of Civil Procedure forbids us to continue to treat him in the same way. This is a question which ought to be argued without reference to considerations of convenience or expediency, which, however, in my opinion, favour the maintenance of the old practice rather than its abolition. The argument used in several of the cases seems to have been that, because the Civil Procedure Code does not provide for the case of Karnavans as it does, for instance, for the case of executors, and does contemplate the joinder of all parties interested in the subject-matter of the suit, the Anandravans of a tarwad cannot be affected by a decree to which they are not parties either actually or constructively under the provisions of s. 30. The general proposition that all persons intended to be prejudicially affected by a decree ought to be joined as parties to the suit cannot be denied ; but there are exceptions from this rule, and the question whether one person represents another is rather a question of substantive law than of procedure. One of the classes of exception consists of the cases of which Bissessur Lall Sahoo *v.* Maharajah Luchmessur Singh (*e*) is an instance. Another consists of the cases in which the principle is admitted that the female heiress under Hindu Law represents the estate in such a manner that a decree against her in a suit properly framed may bind the reversioner. These exceptions have been allowed and main-

(*a*) I. L. R., I Madras, 153.
(*b*) I. L. R., II Madras, 328.
(*c*) I L. R., III Madras, 169.
(*d*) I. L. R., V Madras, 1.
(*e*) L. R., 6, I. A., 233.

tained, notwithstanding the provisions of the Civil Procedure Code. The sections of the Code to which we are specially referred are the 30th and the 13th, explanation V. The 30th section is of a permissive character. So far as concerns the principle involved there was nothing new in the provision. It had been acted on before the Code of 1877 came into force (Srikhanti Narayanappa *v.* Indupuram Ramalingam) (*a*). If it were shown to have been invoked in the case of the Karnavan and his tarwad, it might be said that a decree against a Karnavan could, since the enactment of the Code, be no longer held binding on the tarwad, unless the procedure prescribed by the section were followed. But this is not so, and I do not think it can properly be said that a Karnavan and his Anandravans have 'the same interest' in a suit brought by, or against, the tarwad. The interest of the former, with his right of management and possession and his obligation to maintain the junior members, is surely not identical with the interest of a junior member, who has a claim for maintenance only. The whole contention in favour of the view that the Karnavan represents the tarwad rests on the fact that he is in a position of authority having obligations and duties to perform, for discharge of which superior rights in the tarwad property are conferred upon him With regard to s. 13, explanation V, if it has any application to the case of a Malabar tarwad, it rather supports the view that the tarwad may be bound by a decree against the Karnavan *bonâ fide* litigating on its behalf. I am disposed to agree with Kernan, J., in thinking that the explanation refers alike to claims made by a defendant and claims by a plaintiff. The conclusion at which I arrive is that the Code of Civil Procedure does not prevent our giving effect to the theory of the Karnavan's representative character. I cannot help thinking that learned Judges have been induced to discountenance the theory on the ground that the interests of the tarwads require that all their members should be joined in suits concerning their property or obligations. It was observed in some of the cases that to allow the Karnavan to represent the tarwad in suits would practically amount to allowing him to alienate tarwad property indiscriminately. No doubt the remedy, by suit impeaching the decree against their

(*a*) III Madras H. C. R., 226.

Karnavan on the ground of his fraud or collusion, would not afford the Anandravans a complete indemnity against the possible misconduct of the Karnavan. But the inconvenience resulting is, I think, more than counterbalanced by the evil consequences which have resulted from the departure from the old practice. The result has been that, although a man may have obtained a decree for a debt or for property against the Karnavan and some of his Anandravans, he has been exposed to successive suits by the remaining members of the tarwad. It is always open to some unconsidered infant to re-open the litigation and insist on having the whole question re-tried. The rule of impartibility, which prevails according to Malabar law, renders the consequences of an omission to join all the members of the tarwad, if they are to be deemed necessary parties, much more serious than it is in a similar case under the ordinary Hindu law. Whereas, according to the latter, the creditor or the purchaser might at least retain under his decree against the manager, the share of that manager in the family property, in Malabar he is deprived even of that consolation when the Court holds that a junior member of the tarwad may re-open a litigation which has been fairly conducted by his Karnavan and is persuaded to upset the former decree. In such a system it is not astonishing that a rule making the Karnavan the exclusive representative of the tarwad should find a place."

" For these reasons I am of opinion that the question must be answered in the affirmative " (*a*).

(2) The Karnavan for the time being has an almost absolute control over the distribution of the family income and the family expenditure.

In A. S. 199 of 1855 (Tellicherry), Mr. Holloway held as follows :—

" If a junior of the family is not properly supported by its head his remedy is clear, but he is not justified in holding land of the family against the wish of its head. The authorization of his possession by a former Karnavan is asserted in appeal, but no proof whatever was adduced on this point, and, seeing that it would be open to a succeeding Karnavan to

(*a*) I. L. R., XX Madras, 129.

alter his arrangement, if inclined, there would be no weight in it, if proved."

And, in Ponambilath Parapravan Kunhamod Hajee *v.* Ponambilath Parapravan Kuttiath Hajee, the High Court (Turner. C. J., and Muttusami Aiyar, J.) deal with the general position of a Karnavan thus :—

"The respect for elders, which is a marked feature of all Hinduism, is nowhere stronger than in Malabar, and, consequently, although the individual interest of the manager of a tarwad in tarwad property is considerably less than that of a manager of a Hindu family, he has, in the management of the tarwad property, somewhat larger powers than are accorded to a Hindu manager. While, equally with the manager of a joint Hindu family, he is incompetent to alienate the estate without the consent of the other members of the tarwad, except to supply the necessities of the tarwad, or to discharge its obligations, he can not only make leases at rack rents ordinarily for the term of five years for cultivation, but also leases with fines repayable on the expiry of the terms, in the nature of mortgages (Kanams and Ottis) in which little more than a right to redeem may be left to the family"(*a*).

In Nambiatan Numbudri *v.* Nambiatan Nambudri, the High Court (Frere and Holloway, JJ.) gave judgment as follows :—

"The right of the eldest member of a Nambudri family to manage the property as Karnavan is absolute, and where, as here, a junior member has in fact managed it, this is presumed to have been with the eldest member's permission, and he may at any time interfere and take the actual control" (*b*).

And, in Govindan *v.* Kannaran, the High Court (Innes and Kindersley, JJ.) say :—

"It is contended that, when a Karnavan had acquiesced in the continuance of the arrangements formerly made for holding the property of the tarwad in separate divisions, he should be held to be estopped from disturbing them in his life-time. But,

(*a*) I. L. R., III Madras, 169.

(*b*) II Madras H. C. R., 110.

upon the findings of the Lower Appellate Court, the defendant's position is simply that of agent or manager of a portion of the family property, and it is competent to the family, as represented by the Karnavan and senior Anandravans, the plaintiffs in the suit, at any time to revoke that agency and require that the property so in defendant's control and management be replaced under the Karnavan " (*a*).

And, again, in Madhavi and Shangaran *v.* Kannan Nambiar, the High Court (Innes and Muttusami Aiyar, JJ.) held that an allotment of certain lands for the maintenance of one branch of a tarwad could not be regarded as a final arrangement. They say :—

" The numerical increase of the tarwad must from time to time necessitate a new distribution and a Karnavan is competent to call in property allotted in maintenance and re-distribute it or make arrangements at his discretion for the maintenance of the members " (*b*).

In a case which came before the District Judge of South Malabar (A. S. 208 and 253 of 1881) a dispute arose as to the right of the Karnavan to re-distribute the rooms in the tarwad house as he pleased. The senior lady of the family refused to give up the key of one room which she had occupied for many years. The District Judge held that the power of the Karnavan was absolute, and that he was entitled to possession of the room.

(3) The Karnavan may delegate his powers of management, but not so as to be unable to resume them.

In Cherukomen *alias* Govinden Nayar *v.* Ismala, the question arose as to whether an agreement entered into between a Karnavan and an Anandravan amounted to an irrevocable waiver and transfer of his rights, or was a power of attorney. The Court came to the conclusion that it was the latter, and it therefore became unnecessary to consider whether by contract a Karnavan could part, so as to be unable to resume them, with the privileges

(*a*) I. L. R., I Madras, 351.

(*b*) S. A. 450 of 1881.

and duties which attach to his position as Karnavan. Holloway, J., was of opinion that in no case could a Karnavan renounce his rights and corresponding duties. Innes, J., adds "without the consent and authority of those interested in the performance of the obligations" (*a*).

In Velia Kaimal *v.* Velluthadatha Shamu, it was sought to establish a custom in the family, by virtue of which the senior member of the family retired into dignified retirement and the senior members of the two branches managed the affairs of their respective branches. The Principal Sudder Amin found that plaintiff, who was one of these so-called branch Karnavans, had no authority to sue for the recovery of family property without the junction of the Velia Kaimal, who was the *de jure* Karnavan of the tarwad. The Civil Judge on appeal held that there had been a division into branches, or Tavalis, for seventy-eight years, that the management of the two branches had been vested not in the Velia Kaimal, but in the next senior members of each branch, and that plaintiff had a right to sue.

When the case came up on second appeal the High Court (Scotland, C. J., and Holloway, J.) referred for trial the issue :—

"Whether there was a binding and peculiar custom in the family depriving the senior member of all management of the property and vesting it in the branch Karnavans."

The Civil Judge found that there was no such custom as alleged.

In deciding that the finding was not inconsistent with former decisions, Holloway, J., summed up as follows :—

"I am of opinion : (1) That there is nothing compelling us to decide, contrary to the plain rules of law, that this delegation is irrevocable, perhaps it is not so even by the delegator and still less is it so by his successors. (2) That the fact of the

(*a*) VI Madras H. C. R., 145.

setting apart of Sthanam property, if it was set apart, can make no difference, and as little can the circumstance of the income reserved. (3) That there is nothing to prevent us from deciding that the Civil Judge is right in saying that this is an ordinary Malabar tarwad, and, if I were at liberty to go into the fact, I should entertain no doubt of it. (4) That the renunciation before the Sudder Court is, I am disposed to think, not even irrevocable as against him who made it, and certainly would not have the effect of depriving the senior member for all future time, of the rights which the law of the country conferred upon him with the correlative duties upon his becoming senior.

"With so peculiar a condition of property as that of Malabar, it is most essential for the avoiding of complete anarchy and consequent ruin to maintain the distinct rule as to the Karnavan's powers. Wherever it is infringed, the miserable consequences apparent in the present case immediately result."

And Scotland, C. J., says :—

"Having considered these cases since the argument, I concur in the conclusions that we are not constrained to hold that the irrevocability of the arrangement effected in 1790 by the former head of the family, as to the apportionment of the family property between two Tavalis, and the management of each Tavalis allotment by its senior member, is a matter conclusively adjudicated in the course of the litigation of which there is proof in the records : that such arrangement operated only as a personal renunciation and delegation of the rights of management possessed by the then head of the tarwad, and that, assuming it to have been irrevocable by him, a point on which I entertain at present doubts, it is not binding on the third defendant, who is admittedly the head of the family by right of seniority" (*a*).

In A. S. 459 of 1881 (South Malabar) the District Judge held that, where the delegation of authority amounted to a license coupled with an interest, it could not be arbitrarily determined by the Karnavan. That was a case in which the Karnavan authorized the Anandravan to collect the

(*a*) VI Madras H. C. R., 401.

rents for one year, pay himself a debt due by his Karnavan, and apply the balance to the maintenance of the members.

In a recent case, Kannan *v.* Pazhaniandi (*a*), the question was raised as to whether the Karnavan of a tarwad who as such was the manager of certain trust property of the tarwad had an inherent right as Karnavan to appoint another person to take his place as Karnavan. The High Court (Davies and Benson, JJ.) held that the Karnavan had no such right observing that they "were not aware of any authority for the position that a Karnavan could appoint another to take his place as trustee, a position clearly opposed to the general law of trusts."

In Chappan Nayar *v* Assen Kutti, where the Karnavan of a tarwad having been sentenced to a term of imprisonment delegated to his son all his powers as Karnavan pending the expiry of his sentence, the High Court (Collins, C. J., and Muttusami Aiyar, J.) held that the delegation was *ultra vires* and void. They observed :—

"There can be no doubt, and it is not denied for the respondent, that Karnavanship as recognized in Malabar is a birthright inherent in one's status as the senior male member of a tarwad. It is therefore a personal right and as such it cannot be assigned to a stranger either permanently or for a time. If it can be delegated at all, it is capable of delegation only to a member of the tarwad, the principle being that the *de facto* manager thereby assists the Karnavan during his pleasure, and is entitled to do so by reason of his connection with the tarwad and his interest in its property. We are referred to no decided cases in support of the proposition that Karnavanship is an alienable interest or is capable of being delegated to a stranger to the tarwad. If such were the case a Mappilla might become the Karnavan of a Nayar tarwad, and the anomaly would be apparent when it is remembered that the Karnavan has to preside at the tarwad ceremonies as its representative, in addition to managing tarwad property" (*b*).

(*a*) I. L. R., XXIV Madras, 438.

(*b*) I. L. R., XII Madras, 219.

In Vira Rayen *v.* The Valia Rani, Calicut, the High Court (Turner, C. J., and Muttusami Aiyar, J.) had before them a case in which the head of one of the Calicut Kovilagams claimed certain property in the hands of one of the junior members. The defendant set up his self-acquisition. The Court say :—

"Property acquired by any member of the Kovilagam is, in accordance with the principle recognized in the case of the joint Hindu family, presumed to be the common property of the Kovilagam, unless proof is given that it has been acquired otherwise than with the aid of the common funds : and, as in other Malabar families, properties are sometimes entrusted to the possession of a member who is not by the customary law entitled to their management, either for the purposes of management or as an assignment for maintenance. Such arrangements are made at the pleasure of the Valia Tamburatti of the Kovilagam, who can also at her pleasure resume any properties which have been so dealt with" (*a*).

In Kalladan Madhavi *v.* Kalladan Kannan Nambiar, the High Court (Innes and Muttusami Aiyar, JJ.) held that an allotment of property to a member of a tarwad as maintenance under a family arrangement could not be regarded as a final arrangement, that the numerical increase of the tarwad must from time to time necessitate a new distribution, and that a Karnavan is competent to call in property allotted in maintenance and re-distribute it or make arrangements in his discretion for the maintenance of the members (*b*).

(4) His powers of management [may, however, be limited by contract.

In A. S. 336 of 1854 (Calicut) Mr. Holloway, as Sub-Judge, says :—

"I am clearly of opinion that the whole of the members of a family have a right, by common consent, to regulate the

(*a*) I. L. R., III Madras, 141.

(*b*) S. A. 450 of 1881.

Karnavan's agency, and that such regulations will be binding on all such as have notice, express or implied, of their existence." (Zillah Decisions, September 1855, p. 18.) As Mr. Holloway writes here of "the whole of the members of the family" "by common consent" agreeing to the regulation, it may be presumed that the Karnavan himself was a consenting party.

And again in A. S. 172 of 1859 (Tellicherry) the same Judge, in dealing with a family Karar, held as follows:—

"It is obvious that this document might narrow the powers either of the Karnavan himself or of those who took his place during his life-time, but that it could have no force whatever after his death."

This decision was confirmed by the Sudder Court on appeal.

In Veera Vurma Rajah *v.* Keyadata Raru Nayar, Mr. Holloway, as Civil Judge of Tellicherry, decided that a Rajah, who had agreed to a division of management in respect of certain Devasam properties, was bound by the agreement, and his decision was confirmed by the High Court (Phillips and Frere, JJ.) on special appeal (*a*).

And in A. S. 471 of 1861 (Tellicherry) Mr. Holloway says:—

"*Primâ facie*, the Karnavan is entitled to the possession of family property. He may of course, during his life-time, narrow his own rights by contract, but here he has not done so."

In Raman Nambiar *v.* Valia Nambiar, the Sudder Court (Hooper, Morehead and Goodwyn, JJ.) upheld a decree of the Civil Court of Tellicherry, whereby the joint control of the family property was vested in the plaintiff and the first defendant by a Karar (*b*).

In some more recent cases a distinction has been drawn between a delegation of authority and a family settlement

(*a*) S. A. 368 of 1862. (*b*) Sudder Adalat Decisions, 1857, p. 158.

limiting the powers of a Karnavan, and it has been held that the Karnavan cannot revoke the latter. One or two of these cases may be referred to.

In their judgment in Allala Tharagan *v.* Govinda Tharagan, the High Court (Kernan and Kindersley, JJ.) say :—

"There is ample reason to suppose that the Karar was executed for the benefit of the family. It was the outcome of disputes and litigation in the family, and by it those disputes and that litigation were happily ended. There is apparently no reason for setting aside this Karar, and certainly none for doing so at the instance of the plaintiff (the Karnavan)" (*a*).

And, again, in their judgment in Gopala Menon *v.* Keshava Menon, the High Court (Turner, C. J., and Muttusami Aiyar, J.) held as follows :—

"The rights of the parties were adjusted by the compromise and the decree passed thereon, and in our judgment it has been properly held that the respondent was to hold possession, at least till some other arrangement was made or possibly until the death of the Karnavan. The right of the Karnavan to recover possession applies to cases in which he has voluntarily conceded a temporary possession to an Anandravan for management. Here he has no greater right to put an end to the contract than any member of the family" (*b*).

In these cases it seems to be clear that the Karnavan was a consenting party to the arrangements arrived at and the same remark may, it is believed, be made with reference to two more recent decisions bearing on this question. In Kanna Pisharodi *v.* Kombi Achan it was held by the High Court (Turner, C. J., and Brandt, J.) that the ordinary powers of a Karnavan of a Malabar tarwad could be restricted by a family agreement to which he was a party and that if, in breach of such agreement the Karnavan made an alienation to a stranger who had notice of the

(*a*) S. A. 8 of 1880.

(*b*) S. A. 357 of 1881.

agreement, the tarwad was not bound by the alienation (*a*). Here it is expressly stated that the Karnavan was a party to the family agreement. In Komu *v.* Krishna what was held by the High Court (Muttusami Aiyar and Parker, JJ.) was that a Karnavan was not entitled of his own authority to set aside a family arrangement as to payment of maintenance to members of the tarwad which had been made on behalf of all the members of the tarwad. The arrangement appears to have been entered into before the Karnavan, who was the first defendant in the suit, attained to the office, but it is not stated as to whether he was a party to it as an Anandravan. If he was a party to the contract when a junior member he of course could not repudiate it as Karnavan (*b*).

(5) As an exception to the general rule, in some few Nayar families, a custom exists by which the management is vested in the senior female in preference to the senior male member of the family.

This custom is judicially recognised in the case of the Tamburattis of the Calicut Kovilagams, in Vira Rayan *v.* the Valia Rani (*c*) already alluded to, but they are admittedly an exception to the rule that prevails among other Royal families (except the family of the Walluvanad Rajah) and among Nayars in general. Of course, if the custom can be supported by evidence, it is the duty of the Courts to uphold it.

In A. S. 299 of 1855 (Calicut) Mr. Holloway, as Sub-Judge, remanded a suit when the custom was set up on appeal. But in his final judgment he says :—

"The proof upon which the Munsif has determined the authority over this paramba to reside in the female and not in the male members is wholly insufficient to raise that inference. The documents, from the obliteration of the name, do not in fact show that Ittiyachi demised the paramba to the present tenant, but, supposing that they did, it would indeed be a violent infer-

(*a*) I. L. R., VIII Madras, 381. (*b*) I. L. R., XI Madras, 134.
(*c*) I. L. R., III Madras, 141.

ence that therefore the authority resides in women only. The document is dated 1822-23, and it may well be that from the incapacity of males from tender age the woman was Karnavati in her life-time, but the weight of the evidence clearly shows that the grantor of the Janmam right, Rama Paniker, succeeded her. This is clear from the payment of revenue by him, which would carefully have been avoided if the truth were that in this family females had the management of some portions of the property and males of others. The separation in all acts of ownership would have been most carefully enforced.

* * * * *

"It is always presumed that a Karnavan is the manager of all the family property, and they admit themselves to be subordinate members There are exceptional cases, but these require proof and no more than vague statements opposed to the whole course of conduct have been produced." (Zillah Decisions, March 1857, p. 32.)

And, again, in A. S. 194 of 1862 (Tellicherry) Mr. Holloway, as Civil Judge, says:—

"The only defence attempted there (in the Lower Court) is that the second defendant, the woman, has always been the manager. To establish a custom contrary to the general customs of the country, the clearest evidence is required."

In Lakshmi *v.* Krishna Paniker Mr. Wigram had before him a case in which the custom of female management was found by the Munsif (*a*). He then wrote:—

"I cannot agree with the Munsif that the evidence is sufficient to prove a family custom which, though it may be in accord with primitive usage, is opposed to the present usage of every other Nayar family in Malabar. I do not deny that in some tarwads females are entrusted with the management with the consent of the males, but I never yet heard of a case where the headship was claimed as of right by a female, except in the case of the Kovilagams.

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(*a*) A. S. 434 of 1878 (South Malabar).

"The management of a female, like the management of an Anandravan, must, in my opinion, always be presumed to be with the consent of those on whom the law confers the right of management, *i.e.*, the senior male, and may at any time be resumed. In the present case it appears to me that all that third defendant's evidence amounts to is that her mother managed tarwad affairs during her life-time, and so much plaintiff admits. But is not the whole evidence perfectly consistent with her having assumed the management because there were no males of age in the tarwad? So far as can be seen, she managed excellently for thirty-five years, and it may well be that the male members as they grew up should wish to leave the management in her hands."

This decree was confirmed by the High Court (*a*).

The Amaropolliem Raj Estates and Mines Co. *v.* The Valia Tirvomalpad was a suit brought by a company to compel specific performance of a contract entered into by the three sole surviving adult males of a family to lease certain forests (then under attachment for several judgment debts) for a period of ninety-nine years. On behalf of a minor female in the family, her father applied as next friend to be made a party to the suit, but the Sub-Judge of Calicut, before whom the suit came in the first instance, decided that she was sufficiently represented by her Karnavan. The High Court set aside this order, ordered her to be joined as a party and called up the suit for disposal on the original side of the Court (*b*).

The following passage is quoted from the judgment of Mr. Justice Hutchins who tried the case:—

"At the time of the contract, the first defendant was the nominal Karnavan, while second and third defendants were the adult Anandravans. The fourth defendant is the female member entitled to the property. Upon her mother's death in 1878 it

(*a*) Turner, C. J., and Muttusami Aiyar, J., S. A. 634 of 1878.

(*b*) O. S. 118 of 1880 on the file of the Calicut Sub-Court.

devolved upon her, and after her it will pass to her heirs and not to those of the adult defendants or any of them."

* * * * *

The parties were all anxious to compromise the suit and terms had been arranged, but the learned Judge felt bound to look after the interests of the minor who had been brought before the Court, and to require strict proof of the necessity or propriety of the bargain.

After observing that there were grounds for believing that money had been privately paid or promised to the adult defendants to induce them to execute the lease, he said :—

"It became more than ever necessary jealously to scrutinize the terms by which it was proposed to bind the minor's estate for a period of ninety-nine years."

After going into the evidence, he held that there were debts aggregating seventy thousand rupees which were probably binding on the tarwad, but that there was no family necessity which would justify the alienation of the estate for some three generations. He then proceeds to treat the defendants as trustees of the minor female and summed up thus :—

"On the whole, I am quite satisfied that this was a contract made by a trustee or trustees in excess of their powers, and I have strong reason to believe that they agreed to it in conscious breach of their trust."

In the first edition of this work Mr. Wigram commented as follows on this decision :—

"The objection that I take to this judgment is that it assumes, without sufficient proof, that there was a valid custom in the family vesting the management in the females. Assuming that it had been so, I submit that, if there was no adult female, the management would revert to the senior male who would have all the ordinary powers of a Karnavan. But the sole evidence of the custom consisted of some family Karars vesting the management in the senior female for the time being.

There was actually evidence that the right of management under the Karar of 1855 had at one time been surrendered to the senior male, and that it was only after the agreement to lease had been entered into that the management was nominally re-vested in third defendant as guardian of his minor sister."

"In concluding my remarks on this case, I think it right to observe that the experience of those best competent to judge tells them that, in nine cases out of ten, where a family arrangement has been made vesting the management in females, it has been done for the purpose of fraudulently delaying or defeating creditors."

Under the Canara law, which has been declared to differ only from the Malabar law in more consistently carrying out the doctrine that all rights to properties are derived from females (*per* Holloway, J., in Munda Chetti *v.* Timmaju Hensu (*a*)) the custom of female management exists. The rights of the manager, or ejaman, were thus defined by the High Court (Scotland, C. J., and Ellis, J.) in Subbu Hegadi *v.* Tongu.

"The legal right to the family property is vested in the female members of the family jointly, but for little other practical purpose than regulating the course of succession. No severance of the joint estate can be effected compulsorily, and the possession and control of the property belongs exclusively to the ejaman, or manager, of the family, who is ordinarily the senior of the female members, subject to the obligation of providing proper support for all the other members, and they individually have no right to any thing beyond such support" (*b*).

(6) The rights of the junior members of a Malabar family are the right of the males to succeed to the headship by seniority and the right of the males and females to be supported in the family house.

In A. S. 275 of 1858 (Tellicherry) Mr. Holloway, as District Judge, held as follows :—

"The junior members of the family are not entitled to be supported out of the family house from the family property and, for aught that appears on the face of the plaint, their

(*a*) I Madras H. C. R., 380. (*b*) IV Madras H. C. R., 196.

removal from the family house and living elsewhere is their own act, in which case they have no claim whatever. To give them a cause of action, they must have alleged and, to succeed, they must have proved, that by the acts of their Karnavan they were deprived of subsistence in their own family house. They have not done so, but the whole tone of their plaint shows that the estrangement is voluntary, and it is quite clear that, unless it is the result of their Karnavan's wrongful act, they have no claim whatever. The division of a wholly unsettled and disputed sum into aliquot parts and assigning one to each, is wholly unsustainable on any principle of pleading, law or Malabar custom."

Again, in A. S. 158 of 1860 (Tellicherry), which was a suit brought to recover subsistence from the head of the family at the rate paid by the deceased Karnavan, Mr. Holloway says :—

"Save on the ground of special contract, the juniors have no right whatever to sue in this form. They have a right to be supported in the family house and nowhere else."

And in A. S. 238 and 278 of 1860 (Tellicherry) the same Judge writes :—

"The equality of title asserted by every junior member while he is junior and as regularly denied when he becomes senior, is not a right of every member to an equal share of the produce of the family property. Still less can this right exist where the junior, as his witness states, lives separately. The junior, when subsistence is wrongfully withheld, has a right to its award by a Court of law, which will determine what proportion such amount should bear to the whole property of the family."

In Kunigaratu *v* Arrangaden, the High Court (Frere and Phillips, JJ., had before them a case from Tellicherry decided by Mr. Holloway. The following is an extract from Mr. Holloway's judgment :—

"The plaintiffs recite that they are members of a family following the rule of nephews, that the property of the family is

in the hands of the eldest member, and they ask for a share of the income to be assessed by dividing the whole income into equal parts. The plaint contains the usual fallacy that all the members of the family have equal rights therein. They have equal rights in one particular, each has the right of succeeding to the management as he becomes senior in age. The whole doctrine of a Malabar family is that they are all to reside in the family house and be there supported by the head of the family. There never was the slightest pretence for saying that each was entitled to an account, and if the head could not show that he had expended an aliquot portion of the income upon each member, that such member could sue for the balance, yet to this length, the plaint and the decree of the lower court would lead us. It is manifest that the prayer of the plaint is as inadmissible as a plaint to divide the whole property between the various members would be. To give such a decree would be to violate the sound maxim that the law will not allow to be done indirectly that which it forbids being done directly. I have the very strongest doubts whether it is open to any member of a Malabar family to ask for support out of the family house, but, it being unnecessary here to decide it, I forbear stating the numerous reasons for that opinion."

In dismissing the Special Appeal, Frere, J., held as follows :—

"A family governed by the Marumakkathayam rule can possess property only in its collective capacity The members individually are only entitled to maintenance in the family house, and the doctrine of English Equity as to the right of a *cestui-que-trust* to call for an account has no application to a case like the present. The law is fully explained by the learned Civil Judge in his decree, which is completely in accordance with the result of my eight years' experience in Malabar" (*a*).

In Abbakku *v.* Ammu Shettati the High Court (Scotland, C. J., and Collett, J.) had to determine a Canara suit brought to recover separate maintenance, past and future, from the head of a family governed by the Aliya Santana

(*a*) II Madras H. C. R., 12.

law. The facts found were that the plaintiff and defendant were members of one family, that for at least twenty years before the suit, the plaintiff had lived apart from the defendants and the other members of the family, and had during that time supported herself without receiving or applying for anything towards her maintenance from the family property in the defendant's possession or obtaining any recognition of her right to maintenance.

On these facts, the Court found that the suit was barred by the Statute of Limitations then in force (Act XIV. of 1859) (*a*).

Under the present Limitation Act (XV. of 1877) the Statute commences to run in a suit for arrears of maintenance, when the arrears are payable (2nd Schedule, Art. 128) and in a suit for declaration of a right to maintenance, when the right is denied (Art. 129) (*b*).

In another suit from Canara (Subba Hegadi *v* Tongu), the High Court (Scotland, C. J., and Ellis, J.) held that a female member of a family governed by the Aliya Santana law living apart from her family with her husband, is not entitled to a separate allowance for maintenance out of the income of the family property. After defining the position of the ejaman or manager, the Court held :—

"So far the law appears to be settled and imports clearly, we think, the preservation of the unity of the family, as the only effectual mode of securing to the members severally a full

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(*a*) IV Madras H. C. R., 137.

(*b*) The High Court (Boddam and Bhashyam Aiyangar, JJ.) has recently held that a claim by the junior members of a tarwad against the Karnavan to enforce their rights to participate in the joint enjoyment of the tarwad property according to a family karar is not "a suit relating to maintenance" within the meaning of Art. 38, Schedule II of Act IX. of 1887, but is "a suit for the enforcement of a right to or interest in immoveable property" of the tarwad and is not cognizable by a Court of Small Causes under Art. 11, Schedule II of Act IX. of 1887. (Achutan Nayar *v.* Kunjuni Nayar, Ref. Case 4 of 1903.) Madras Law Journal, Vol. XIII., p. 499.

share of the beneficial enjoyment of the joint estate. The obvious effect of allowing one or more members to quit the family and live apart on a portion of the income of the estate sufficient to support a position like that enjoyed by the other members, would be to reduce the benefits to the family in a greater or less degree according to the numbers who might choose to live separately on such allowances and nearly as much so as by apportioning shares of the *corpus* of the property on a division. It seems to us therefore that the peculiar beneficial interest of the members individually in the family property is in its nature incompatible with separation from the family "(*a*).

In Peru Nayar *v.* Ayyappan Nayar, from South Malabar, the High Court (Kernan and Muttusami Aiyar, JJ.) said :—

"Though the general rule is that an Anandravan cannot have separate maintenance, there may be rare exceptions, and this case the Judge has found is one, as the Karnavan has been the cause of quarrels which necessitate the plaintiff leaving the family house. The maintenance granted, *viz.*, two rupees *per mensem*, is intended to discourage such applications." (*b*)

In Chalayil Kandotha Nallakandiyil Parvadi *v.* Chalayil Kandotha Chathu Nambiar, the High Court (Turner, C. J., and Kindersley, J.) held that the general rule that a member of the tarwad is not entitled to maintenance, if she cease to reside in the family house, is not contravened by the recognition of a right to maintenance in a member residing in one of several houses which convenience or necessity has, as it were, affiliated to the original tarwad house as places of residence for members of the tarwad (*c*).

In Valia Parvathi *v.* Kamaran Nayar the question raised was whether in North Malabar a male member of a Nayar tarwad is by custom entitled to receive allotments of money from the Karnavan of his own tarwad for the maintenance of a woman belonging to another tarwad with whom he

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(*a*) IV Madras H. C. R., 196. (*b*) I. L. R., II Madras, 282.
(*c*) I. L. R., IV Madras, 169.

has formed sambandham and his children by him when they came to live with him in his own tarwad house. When this question came before the High Court (Turner, C. J., and Kindersley, J.), on an appeal from a decision of the District Judge of North Malabar who had disallowed this claim, the Judges observed as follows :—

"Although it would seem inconsistent with the principles of the Marumakkathayam law that the tarwad should contribute to the maintenance of the ladies with whom the male members cohabit and of the issue of such cohabitation, these ladies and their issue being members of another tarwad, and entitled to claim maintenance from their own tarwad, unless they voluntarily remove from the house of their tarwad, it is urged in this Court that it is the practice of the country in North Malabar for females to reside during the whole year in the tarwad of the male with whom they cohabit, and that, during such residence, they are maintained at the expense of the tarwad in which they reside. A passage has been cited from Buchanan's journey through Mysore, Canara and Malabar, which supports this assertion so far as regards the residence of the ladies. It is also stated that in other claims for maintenance, which have been allowed in the tarwad to which the parties belong, male members have received allowances for the maintenance of such ladies and their children We shall therefore remit for trial the issue whether by custom the expense of maintaining the ladies with whom the male members of the tarwad cohabit, and of maintaining the issue of such unions when visiting the tarwad home, is allowed as a proper charge on the revenues of the tarwad."

The District Judge on remand examined two witnesses, who gave evidence of the existence of the custom set up and then, as their evidence was not objected to by the 1st defendant, returned a finding to the effect that the claim made was a proper one. As before the High Court no one appeared for the respondent (defendant), the finding was accepted and a decree passed accordingly (*a*). In

(*a*) I. L. R., VI Madras, 341.

my opinion this was a case that should not have been reported. The report has the following head-note:—"In North Malabar the male members of a Nayar tarwad are by custom entitled to receive from the Karnavan an allowance for the maintenance of their consorts and children while living in the tarwad house." It is, however, clear that the High Court passed no decision to this effect and indeed decided nothing. An issue was sent down as to custom and, as the finding of the District Judge was not objected to in the High Court, a decree was passed in accordance with it. It cannot, however, from this fact be assumed that the learned Judges were of opinion that the evidence of the two witnesses examined by the District Judge was sufficient to establish the custom.

In a recent case the High Court (Subramania Aiyar and Moore, JJ.) held that the fact a Nayar woman, who usually lived with her children in a house belonging to her own tarwad, occasionally left that house in order to visit in his own house a man with whom she had formed sambandham did not amount to living away from the tarwad house so as to disentitle her to claim maintenance from the tarwad to which she belonged. They remarked that the case would be different if the woman and her children had been proved to be residing permanently in the house of her Sambandhakaran (*a*). It must be admitted that this decision, read with that arrived at in Valia Parvathi *v.* Kamara Nayar (*b*), leaves the law as to this question in a very doubtful condition. The result of the judgments appears to be that, if the woman and her children live temporarily in the house of the man with whom the mother has formed Sambandham, he is entitled to receive maintenance for them from their tarwad but that, if they live permanently with him, the Karnavan of his own tarwad is bound to give them maintenance. This question

(*a*) Raman Menon *v.* Ittimayamma (S. A. 1194 of 1898), Madras Law Journal, Vol. IX., p. 153.

(*b*) I. L. R., VI Madras, 341.

will require full consideration when it next comes before the High Court.

In Teyan Nayar *v.* Ragavan Nayar the facts found were that the first plaintiff was a misbehaving member of the family, and that he was not in need of maintenance as he was possessed of exclusive property in his own right. On these grounds, his claim for arrears of maintenance was rejected by both the Lower Courts.

The High Court (Innes and Tarrant, JJ.) however held as follows :—

"It is contended in Second Appeal that plaintiff's misbehaviour does not disentitle him to his right to be maintained from the family funds. We think this contention is well founded. A tarwad does not differ in this respect from an ordinary Hindu family, the manager of which is not entitled to exclude the members from a right to a perception of some portion of the income of the family property. It seems apparent that, if a Karnavan could adopt this course, it might result in such an exclusive possession of the tarwad property on the part of the Karnavan and the rest of the tarwad as would in the course of years extinguish all right in the Anandravan in the tarwad property. The circumstance that first plaintiff has other property is not an element in the consideration of his right to share in the enjoyment of the joint family funds. If it were, a man's own individual industry and exertions might be the means of depriving him of his right in the joint property" (*a*).

In Thayu Kunji Ama *v.* Shangunni Valia Kymal, the High Court (Turner, C. J., and Muttusami Aiyar, J.) observed :—

"The Judge is of opinion that, where the members of one branch of the tarwad house have private means of their own, the Karnavan is not bound to make them the same allowance as he does to other members of the tarwad," and then, after quoting the ruling in Teyan Nayar *v.* Ragavan Nayar (*a*) the Judges proceed :—"These rulings, though apparently contradictory, are not, in our opinion, irreconcilable. *Primâ facie*,

(*a*) I. L. R., IV Madras, 171.

the members of a tarwad have equal rights to support out of family funds, but they are not entitled to definite shares in the income, and the Karnavan is not accountable if he gives to some more than to others, provided he gives to each what, under the circumstances, would be a reasonable allowance for his subsistence. The circumstances of each member in respect of his private acquisitions would not affect his right to subsistence, where the income was sufficient to provide a suitable subsistence for all the members of the tarwad; but where the income is insufficient for this purpose, the Karnavan must, with due regard to the interests of all, look to the private means of each" (*a*).

And again, in Kunhambu Nambiar *v.* Paidal, Kunhakom and others, the High Court (Turner, C. J., and Kindersley, J.) held :—

"The members of the tarwad are entitled to receive maintenance out of the tarwad house, when there is no room for them in that house, and, if the Karnavan makes an insufficient allowance, the Anandravans are entitled to apply to the Court to determine what allowance is sufficient, having regard to the circumstances of the family. When the wealth of the tarwad increases, the allowance may be increased" (*b*).

The decision in Teyan Nayar *v.* Ragavan Nayar (*c*) apparently goes far beyond any of the previous decisions and has a dangerous tendency to encourage family litigation. As explained by the decision in Thayu Kunji Ama *v.* Shangunni Valia Kymal (*a*), it is less open to objection. The generally received opinion formerly was that contumacious conduct on the part of an Anandravan did disentitle him to a separate maintenance. As stated in the old cases, his right is a right to be maintained in the family house and nowhere else. Again, if members of a family lived apart from the tarwad on their own acquisitions, their claim to a separate maintenance was considered to be untenable, unless the separate residence was an arrangement sanctioned by the tarwad. It is

(*a*) I. L. R., V Madras, 71. (*b*) S. A. 23 of 1882, H. C.

(*c*) I. L. R., IV Madras, 171.

very doubtful, however, if these principles would now be strictly enforced by the courts.

The question as to whether a member of a Malabar tarwad can bring a suit against the Karnavan for a monthly allowance in money on the ground that the Karnavan does not make sufficient provision for his maintenance has come before the High Court on several occasions. In Kunhammatha *v.* Kunni Kutti Ali, it was held (Turner, C. J., and Muttusami Aiyar, J.) that, if the members of the tarwad actually lived in the tarwad house, he could not bring such a suit. Turner, C. J., observed :—

"I can find no authority, and none has been cited at the bar, to show that members of a tarwad residing in the tarwad house are entitled either separately or collectively to obtain a decree for the payment monthly of allowances in money on the ground that the Karnavan does not make sufficient provision for their maintenance. Each member of the tarwad has a right to be maintained, and suffers a personal wrong if that right is not accorded to him. On the other hand, I do not see how the Karnavan's disregard of the right of an Anandravan to be maintained with others in the family house can properly be made the subject of a money allotment. It appears to me that the only remedies open to the members of the tarwad, if the Karnavan neglects his duty to provide for its resident members, are to procure supplies on credit for the payment of which the tarwad properties would be liable, or to sue for the removal of the Karnavan on the ground of his neglect of a primary duty. In the absence of authority, I hesitate to grant relief in a form which the Judge has rightly observed is inconsistent with the tarwad system," and Muttusami Aiyar, J., added as follows :— "I concur. But I do not desire to express an opinion on the right of all the Anandravans to sue together to compel their Karnavan to make an adequate provision for their support in the tarwad house. The Karnavan is legally bound to provide suitable maintenance for his Anandravans in the tarwad house, and it may be a question whether a joint suit by the Anandravans is not a proper remedy. Each Anandravan has a right to be maintained, but it is a right to be maintained jointly with others in the tarwad house, and his remedy is that of one who has a

joint and indivisible right to enforce. The suits before us are not, however, suits framed on this view, and the relief claimed, *viz.*, a separate money allowance for a few members, is not one to which the plaintiffs are entitled" (*a*).

In Kesava *v.* Unnikkanda, the District Munsif and the District Judge on appeal, held that, under the authority of this ruling, an Anandravan of a tarwad living in the tarwad house could not bring a suit for maintenance against the Karnavan who had left the family house, resided elsewhere and neglected to maintain the plaintiff. But the High Court (Brandt and Parker, JJ.) on second appeal, reversed this decision observing :—

"The case, upon the authority of which the Courts below have thrown out the appellants' claim, is not on all fours with the present. In Kunhammatha *v.* Kunhi Kutti Ali (*a*) the right of Anandravans of a Malabar tarwad to receive maintenance is not questioned, but there the parties were living in the tarwad house with the Karnavan and were being maintained, but they wanted a special allowance, objecting to the scale of maintenance with which they were provided. Here the case for the appellants is that up to October 1883 they had been maintained by the Karnavan in the tarwad house, but that the first respondent then went away from that house to live elsewhere, leaving them unprovided for. We are not aware of any decided case and are of opinion that there is no principle with reference to which it should be held that the appellants in such circumstances are not entitled to maintenance" (*b*).

In a more recent case, Chekkutti *v.* Pakki, this question came before the High Court (Collins, C. J., and Muttusami Aiyar, J.) in a somewhat different form. There certain junior members of a tarwad, who lived in a tarwad house apart from the Karnavan, filed a suit against the Karnavan for arrears of maintenance. The Lower Courts dismissed the suit, but the High Court, on second appeal, held as follows :—

"It is not denied that the plaintiffs live in a tarwad house and apart from the Karnavan, nor does he allege in his written

(*a*) I. L. R., VII Madras, 233. (*b*) I. L. R., XI Madras, 307.

statement that they live apart from him without his permission or contrary to his wish. On the contrary, the Karnavan's defence is that he supplies them with an adequate provision: and it is not denied that, as found by the District Munsif, the only income they derive from the portion of the tarwad property in their possession is fifteen rupees per annum. That sum is manifestly inadequate for the support of the plaintiffs. The decision in Kunhammatha *v.* Kunhi Kutt Ali (*a*), as already remarked by this Court, has no application to the present case. That was a case in which the plaintiffs lived in the tarwad house with the Karnavan and the others. The case falls within the principle laid down in Nallakandiyil Parvadi *v.* Chathu Nambiar (*b*) and the fact that the maintenance claimed was computed at ten rupees per head does not, in our opinion, disentitle them to a decree for such an amount of maintenance as would be reasonable in the position in which they are placed" (*c*).

In a recent case, Krishnan *v.* Govinda Menon, a junior member of a Malabar tarwad left the tarwad house, and, without the consent of the Karnavan, went to Palghat in order that he might learn English there. When the Karnavan refused to pay the expenses incurred by him for maintenance and school-fees and the Anandravan sued for the amount of the same, the High Court (Subramania Ayyar and Moore, JJ) held that he could not recover, the Judges observing that, unless it could be held that a Karnavan was bound to give the junior members of a tarwad an education through the medium of the English language and on western lines, the suit must fail, and, finding that such education had not become essential in the sense that it was incumbent on a Karnavan to provide for it as part of his duties with reference to the members of the tarwad, rejected the claim (*d*).

In the first edition of this work, Mr. Wigram observed that, as to the rate of maintenance usually awarded, a practice, for which he was mainly responsible, had grown

(*a*) I. L. R., VII Madras, 233. (*b*) I. L. R., IV Madras, 169.
(*c*) I. L. R., XII Madras, 305.
(*d*) S. A. 2007 of 1897, Madras Law Journal, Vol. VIII., p. 294.

up in South Malabar of limiting the rate to a proportionate share of half the available income. When. however, this practice came under the consideration of the High Court (Turner, C. J., and Muttusami Aiyar. J.), in Narayani *v.* Govinda, it was held that there was no authority for it. Turner, C. J., remarked as follows :—

"There is no authority for the practice, which has been recently introduced in the Malabar Courts, of awarding one moiety of the assets of the tarwad to the Karnavan. The tarwad is a family, of which the Karnavan is the manager, and, although as a senior member he enjoys special consideration, he has no higher claim in the enjoyment of the income than any other member of the family. He has a right to expend, as he pleases, for the common benefit of all. Amongst other expenditure, it devolves on him to see to the performance of ceremonies and to the upkeep of the house and other family properties, and, when it becomes necessary, to ascèrtain what is a proper allowance for members who do not reside in the tarwad house. Allowance must, no doubt, be made for the charges which especially devolve on the Karnavan. In some cases, it may be necessary to allow him to retain more, in others less than one moiety of the net profits, but in each case the allowance to the Karnavan must be determined in advertence to the particular circumstances. Allowance should also be made for the satisfaction of debts, and it must be determined whether any debts alleged to be due are in fact due by the tarwad if the liability of the tarwad is disputed" (*a*).

Reference should be made to the observations in a recent judgment of their Lordships of the Privy Council as to the general powers of the Karnavan of a Malabar tarwad, which I have already quoted in dealing with the power of a Karnavan to adopt new members into the tarwad (*b*).

(*a*) I. L. R., VII Madras, 352.

(*b*) Thiruthipalli Raman Menon *v.* Variangattil Palisseri Raman Menon, L. R., XXVII, I. A., 231; S. C., I. L. R., XXIV Madras, 73, *vide* pp. 34—38 *ante*.

CHAPTER V.

REMOVAL OF KARNAVAN.

If the Karnavan has entered upon a course of conduct which, unless checked, must end in the ruin of the family, and if he presistently disregards the interests of the family, of which he is the head, and more especially if he violates his own solemn promises of reformation, sufficient ground has been shown for his removal and the substitution of some fitter manager in his place.

In appointing a new Karnavan, the wishes of the members of the family ought to be consulted.

The earliest authority on record as to the interference of the Courts is the judgment of the Provincial Court of the Western Division in Cheru Amma *v.* Romara Nambiar passed on 13th June 1813. That was a suit for partition. The Court (Stevens and Clephane, JJ.) held as follows :—

"The demand on the part of plaintiffs for a divison of the property belonging to the tarwad, or family, of which they are members is totally at variance with the established practice of the country. In cases where the Marumakkathayam rule of inheritance prevails the property is considered as indivisible. The management thereof and the collection of the rents and income being invariably vested in the senior male, on whom devolves the duty of providing for the support and maintenance, as far as the funds will admit, of the other branches of the family, especially of the women and children."

"The Courts of Justice can only interfere in the event of its being proved that the Karnavan or senior has shown himself unworthy of such management from incapacity or gross extra-

vagance and inattention to just claims and wants of the junior members, when he may be set aside and another of the seniors appointed in his stead."

Then, after commenting on the fact that, as the plaintiffs (two males) were junior to the defendants, they could have no right to participate in the management, the judgment proceeds as follows:—"The Court nevertheless consider it to be just and expedient, as well as to be not inconsistent with the customs of the country, that the plaintiffs shall be invested in the character of Anandravans with a joint share in the future management of the remaining property, to the end that they, in conjunction with the Karnavan, may proceed to take an account of the debts due and mortgages on the property, in order to clear off the same, either by assigning the property mortgaged in lieu of the debt, where the said debt may equal or exceed the value of the property mortgaged, or by the sale of the said property when the value thereof shall be more than the amount of the mortgage."

From the decree of the Provincial Court, there was an appeal to the Court of Sudder Adalat which (Scott and Greenway, JJ.) confirmed the decree of the Provincial Court (*a*).

In Areaky Coonhy Taroovoo *v.* Areaky Awoolla Hajee, Mr. Holloway, as Civil Judge of Tellcherry, gave judgment as follows:—

"It only remains to determine whether the Karnavan has been guilty of such misconduct in his trust as justifies his removal from the management, for it is quite clear that such removal will be ordered where the conduct which he has pursued shows that the family affairs cannot safely be left in his hands. The janmam deed of his bazaar most clearly shows that, in asserting it to be his own property, he has lied grossly and evidently for the purpose of passing it to his blood relations. His pretence, first, that the bazaar is his own, then that his son will inherit it, and then that he has expended large sums of money upon it, all clearly show that he is guilty

(*a*) A. S. 28 of 1814; I Sudder Decisions, 118.

of the attempts with which the plaintiffs have charged him. This is further clear from his own assertion that he has pawned property, and that he asserts his right to do what he likes with it. It is obvious that he is a man of very advanced age, for he was actively litigating before the year 1823, and is no doubt entirely under the control of his blood relations as his answers in this case plainly show. The result of his continuance in the management is abundantly clear. There is not the slightest proof that any of this property is self-acquired, and it appears to me clear that a Karnavan who sets up a defence of this kind, in clear fraud of the family, has by that act alone exhibited his unfitness to continue in the management. The denial of his lessor's title is the greatest offence which a lessee can commit, and it is difficult to see how a Karnavan can more clearly show himself an unfit person for the office than by claiming as his own property which is that of the family to which he belongs. The rule of descent exists and the efforts of the courts should be in accordance with the law to prevent the gross acts of spoliation constantly carried on by heads of families, which have reduced some of the most respectable families in Malabar to beggary. Such prevention can only be effected by removing from their posts men who are proved to have acted as this man has done. Feeling clear that all the property here sued for is the property of the family and that the defendant has been shown by his own acts to be an unfit man for the management of that property, my decree, in accordance with what I conceive clear law, will be to remove him from the post of Karnavan and declare that the management shall be vested in the next senior member."

This decree was confirmed by the Sudder Court on special appeal (*a*).

Again in A. S. 61 of 1860, Mr. Holloway, as Civil Judge of Tellicherry, made a similar decree. His judgment concludes as follows:—

"It has been pressed upon me that it is very inconvenient to remove heads of families. I allow that it should never be

(*a*) S. A. 373 of 1860.

done without clear proof that the conduct of the head is calculated to beggar the family. But, considering that this has been made out, I confirm the decree of the Lower Court and dismiss this appeal with costs."

In Elaya Tamburatti *v.* Valiya Tamburatti, the High Court (Holloway and Kindersley, JJ.) had before them a case in which it was sought to remove the Valiya Tamburatti of the Pudia Kovilagam. The Subordinate Judge refused to grant the relief sought, and the High Court confirmed his decree, making the following observations:—

"We do not agree with the doctrine of the Subordinate Judge that a single act of misfeasance afforded sufficient ground for the removal of a Karnavan. Such removal ought to take place only on paramount ground of necessity" (*a*).

In O. S. 5 of 1870, Mr. Reid, as District Judge of Tellicherry, had before him a case in which twelve members of the Cherikal Kovilagam sued for a declaration, that encumbrances to the extent of more than one lakh of rupees raised by the manager, who was also third Rajah, were invalid, and for his removal from the office of manager. Mr. Reid found that, in his position of manager, the Rajah's position was the same as that of an ordinary Karnavan, that the alienations made were unjustifiable and ordered his removal.

Against this decree no less than twenty-two appeals were preferred to the High Court. The High Court (Morgan, C. J., and Kindersley, J.) on the 23rd March, 1877, reversed Mr. Reid's decree and dismissed the original suit, but without prejudice to any question that might be hereafter duly raised respecting the alienations. Unfortunately, they omitted to record any judgment in the case.

The next case was Eravanni Revivarman *v.* Ittapu Revivarman. The family to which the parties to the suit belonged consisted of only two adult males. The younger brought a suit to remove the elder. It was found by the

(*a*) R. A. 24 of 1876.

lower Courts that the conduct of the elder was such as to justify his removal, but that the interests of the tarwad would not be safer in the hands of the younger than in the hands of the elder. On appeal Mr. Wigram, as District Judge of South Malabar, decided to appoint a receiver of the estate. Meanwhile a second suit was brought by the senior female in the tarwad to remove the elder male and appoint her in his place. The lower Court dismissed the suit in consequence of Mr. Wigram's decision.

The High Court (Morgan, C. J., and Holloway, J.) had both suits before them and recorded the following judgment :—

"The litigation by which it has been sought to remove the Karnavan from his position has terminated in a finding that no one of the persons who seek to depose him is better qualified than he for the office, and the Judge has handed over the management of the tarwad to a person called a receiver."

"These proceedings show very clearly the mischievous extension of the doctrine as to the removal of Karnavans."

"It is a kind of litigation which is of recent growth, has been fostered by the sympathies of Judges who are themselves Anandravans, and, as in a case which recently came before us, it has been exercised on the mistaken principle that a man can properly be removed whenever a single departure from his duty to act equally for the benefit of all can be proved against the Karnavan."

"In such a state of property and family relations as that of Malabar there must be a constant conflict of interest with duty. This, however, throws upon the Courts in case of such conflict the duty of checking acts referable to interest of that character, but it by no means justifies the treatment of the Karnavan as a mere trustee, officer of a corporation, or other person to whom he has been likened. The law in this case, as in so many others, has suffered from the pressing of a false analogy. The person to whom the Karnavan bears the closest resemblance is the father of a Hindu family. Like him, his situation as head of the family comes to him by birth. He should certainly not be removed from his situation except on

the most cogent grounds (*a*). The office is not one conferred by trust or contract, but is the offspring of his natural condition. Expediency speaks the same language as the law. Benefit seldom accrues to a family or an institution from removing one man and putting in another. It is generally the substitution of the empty leech for the full one. The belief that this removal will take place on slight grounds has led in this very family to a long course of litigation which must have caused much of the expenditure complained of. It is stirring up family quarrels throughout the district, and no more striking instance than the present of the inexpediency of such a course could be given. The plaintiff in the regular suit is really the Brahman paramour of one of the women, a by no means desirable manager of a Malabar family. The plaintiff in the other suit is a greater spendthrift than the Karnavan. The grounds given for the Karnavan's removal would certainly not have satisfied us of the propriety of taking that course. The question is not merely whether a man is unworthy of his position, for that is not the ground for removing him, but whether the removal will benefit the family."

"We certainly can see no case which could justify any Court in saying that his conduct has been such as to satisfy it that he cannot be retained in his position without serious risk to the interests of the family, still less can we see ground for the revolutionary remedy of the District Judge."

"Compelled to choose between introducing a stranger and leaving the management in the hands of him to whom law and custom assign it, there can be no doubt on the facts of this case that we ought to choose the latter course. The state of families and property in Malabar will always create difficulties. Their solution will not be assisted by bringing in the anarchy and insecurity which will always follow upon any attempt to weaken the natural authority of the Karnavan."

"In all these cases, the order of this Court will be to dismiss the original suits" (*b*).

(*a*) *Vide* also judgment in Elaya Thamburatti *v.* Valia Thamburatti (R. A. 24 of 1876), *per* Holloway and Kindersley, JJ.

(*b*) I. L. R., I Madras, 153.

This was thenceforward regarded as the leading case on the subject both in North and South Malabar.

In Ramen Nambiar *v.* Krishnan Nambiar (North Malabar) Mr. Reid decreed the removal of a Karnavan on the ground of intemperate habits, frequent absence from his tarwad, contracting debts subsequently to the disposal of a suit in which a *locus penitentiæ* had been granted to him, and, last but not least, the extraordinary procedure of putting the collection of the rents in the hands of Embrantiris, many of whom were grasping money-lenders.

This decree was confirmed by the High Court (Kernan and Kindersley, JJ.) (*a*).

In A. S. 162 and 319 of 1877 (South Malabar) Mr. Wigram decreed the removal of the head of the Edatara tarwad, which is a branch of one of the ancient houses forming the Nayar aristocracy of Malabar. He summed up in the following words :—

"The conclusion I have arrived at is that there will be no peace in the tarwad and no chance of the preservation of the tarwad property until the first defendant is removed. The tarwad houses are now in ruins and it is evident to me that the first defendant has used the position which the law and custom conferred on him to enrich himself and neglect his obligations. In the present suit, it will be observed that the Anandravans are almost unanimous in asking for his removal, whereas in the previous suit the majority sided with him. Since that suit was decided, he has broken his promises and all future hopes of his amending his ways are vain. He has neglected to support the members of his family who, by law and custom, look to him for support. He has encumbered the family property fraudulently and, looking at the income of the tarwad, unnecessarily."

The decree of the District Judge, which provided for a separate annual allowance on a liberal scale to the late Karnavan, was confirmed by the High Court (Morgan, C. J., and Innes, J.).

(*a*) S. A. 712 of 1877.

In Ramen Vaidyar *v.* Ambu Vaidyar (North Malabar) Mr. Reid, in modification of the Munsif's decree removing a Karnavan, directed that his power should in future be restricted by compelling him to join his senior Anandravan in all acts of management. On appeal the High Court (Turner, C. J., and Muttusami Aiyar, J.) recorded a judgment from which the following is an extract :—

"We are not aware of any instance in which a Court, retaining a Karnavan in office, has imposed on him such conditions as those to which the Lower Appellate Court has, by its decree, subjected the appellant."

"The Court must either pronounce a Karnavan unfit for his office and dismiss him from it or, if it retain him, it must allow him to exercise the ordinary functions of a Karnavan unless he consents to surrender them" (*a*).

In Chami Mannadiar *v.* Thengu Mannadiar (South Malabar) the District Judge ordered the removal of a Karnavan who had broken his solemn agreement not to encumber family property without the consent of his Anandravans, who had persistently refused to provide maintenance for his Anandravans and compelled them for four consecutive years to have recourse to suits, who had allowed the family lands to be attached and, on one occasion, sold for arrears of Government revenue, and had further omitted to defend a suit where a good defence was open to him and which would have been decided against him, but for the intervention of another member of the family.

This decree was confirmed by the High Court (Kernan and Kindersley, JJ.) (*b*).

In Ponambilath Parapravan Kunhamod Hajee *v.* Ponambilath Parapravan Kuttiath Hajee and Tod *v.* Ponambilath Parapravan Kunhamod Hajee the High Court (Turner, C. J., and Muttusami Aiyar, J.) had before them a case from North Malabar in which the Karnavan had granted

(*a*) S. A. 766 of 1880. (*b*) 753 of 1881.

to the second defendant a lease for ninety-nine years of a tract of forest computed to contain one hundred and twenty square miles for coffee or other cultivation at an annual rent of two hundred rupees. The only consideration received for granting the lease was a promissory note for five hundred rupees. The junior members objected to the lease and asked for the removal of the Karnavan. There had been previous litigation in the family which resulted in a compromise which, however, proved ineffective. The Sub-Judge set aside the lease, but refused to remove the Karnavan, quoting as his authority the case of Eravanni Revivarman *v.* Ittapu Revivarman. On appeal the High Court say :—

" We have fully considered the observations made by the learned Judges by whom Eravanni Revivarman *v.* Ittapu Revivarman (*a*) was decided, and we agree that the Court should remove from office a Karnavan only when a strong case is made out to show his unfitness for the office. But the circumstance to which we have adverted appears to us to establish such a case. For the reasons recorded in the connected appeal, we have arrived at the same conclusion as the Subordinate Judge as to the invalidity of the lease to Mr. Tod; and although, if this lease had stood alone, we might have considered its extreme improvidence did not justify us in depriving the respondent of his position, yet, when taken with the conduct he has for some years pursued, it affords the strongest evidence that he is unfit for his position, and that the management of the tarwad estate can no longer be left in his hands with due regard to the interests of the family. The granting of the lease is not an isolated act, it is a wilful misuse of his powers, following on a course of conduct in which he persistently displayed disregard for the interests of the tarwad and violated the contract which had been imposed on him to restrain his irregularities" (*b*).

In Govindan Nambiar *v.* Krishnan Nambiar, the High Court (Turner, C. J., and Innes, J.) held that a suit for the removal of a Karnavan was incapable of valuation

(*a*) I. L. R., I Madras, 153. (*b*) I. L. R., III Madras, 169.

and fell under Clause VI, Article 17, Schedule II of the Court Fees Act (*a*). In 1903, however, the High Court with the sanction of Government promulgated the following rule as to the valuation of such a suit :—

"The subject-matter of a suit for the removal of a Karnavan or Ejaman, or for the enforcement of a person's right as Karnavan or Ejaman of a tarwad governed by the Marumakkathayam or Aliyasantana system of law or of a Nambudri illam, shall, for purposes of the Court Fees Act, 1870, and the Suits Valuation Act, 1887, be valued at one-third of the amount at which the same would be valued under the provisions of the Court Fees Act, 1870, if the suit were one brought by a stranger for the recovery of the whole property—moveable and immoveable—possessed by the tarwad or illam to which the suit relates" (*b*).

(*a*) I. L. R., IV Madras, 146.

(*b*) Notification of the 26th February, 1903, *vide* Fort St. George Gazette of 3rd March, 1903, Part II, p. 368.

CHAPTER VI.

ALIENATIONS BY KARNAVANS.

Alienations by a Karnavan, whether in the form of gifts, sales or mortgages, are invalid unless made with the assent, express or implied, of the junior members.

In the case of gifts or sales, the express assent of the family is required. The junction of the senior Anandravan is some, but rebuttable, evidence that the family assented. It is not absolutely necessary that the senior Anandravan should affix his signature to a deed of sale or gift. If the deed was drawn up in the tarwad house and the adult members of the family were present and verbally assented, the transaction is valid.

As the manager of the family property the Karnavan has authority to pledge the credit of the family for necessary purposes, but it cannot be held that the family property is liable to be dissipated by enforcement of decrees against the Karnavan for any simple debt of whatever character contracted by him. The question as to the person on whom in any particular case the burden of proof lies as to the necessity of a loan to a Karnavan depends on the circumstances of the case and not on any presumption arising out of Malabar institutions.

A *bonâ fide* creditor is protected if, after due enquiry, he satisfies himself that the money was

required by the Karnavan for a family purpose. Even if the power of the Karnavan to borrow is limited by a family agreement, it is still necessary to show that a *bonâ fide* creditor had notice of such agreement.

There will always be a strong presumption that alienations by a Karnavan in favour of his immediate relations and still more in favour of his own children are fraudulent.

The whole of the tarwad property is liable for a tarwad debt properly incurred by its head.

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(1) In the case of gifts or sales, the express assent of the family is required.

In the Vyavahara Samudra, a law treatise in Malayalam verse, the principles of which are professedly derived from the text-book of Narada, though the details are founded on the practice of the country, the following stanza stating the incidents necessary to give validity to a deed of sale (Attiper) will be found.

"When one takes from another the janman (proprietary right) by the water of obligation, the prescribed law is that, according to an excellent rule, there should be six persons present, namely, people of pure caste, relations, a son, the scribe of the king, and people connected with the parties. Unless these here mentioned are present, no portion of land must be bought."

Major Walker, in his Report upon the tenures and forms of transfer of land in Malabar writes :—

"At the time of executing this deed (Attiper), which completes the purchase, six persons must be present, *viz.* :—

"One of the caste of the Janmi, one of his near relations or kindred, the heir, a person on the part of the Rajah or Sovereign who must be apprised of the transaction, the person

who draws out the Kanam or deed, and the Deshavali, the chief of the village or district" (*a*).

It is partly in accordance with the ancient custom, as here recorded, and partly on the ground that all the members of the family are joint tenants, that the Courts have held that a sale is not valid without the consent of the heirs or Anandravans. As a matter of fact outright sales were of very rare occurrence in ancient times. It is hardly necessary to observe that the stanza in the Vyavahara Samudra refers to a deed of sale by a Brahman where the son is the heir.

The earliest judicial authority on the subject of alienation of real property is a judgment of the Provincial Court of the Western Division in 1816, where it was held that a deed of sale signed by the head of the family alone, but executed in the presence of the whole family and without a dissentient voice, was valid (*b*).

This was followed by a decision of the same Court in 1839. It was there held that no Karnavan can alienate real property, whether acquired by himself or otherwise, without first obtaining the consent of his Anandravan (or next heir) (*c*).

This was quoted as the leading case by Mr. Frere, as Civil Judge, Tellicherry, in two appeals decided by him in 1854 (*d*).

In Ahmood Koothy Hajee *v.* Koonhum Bee, the Sudder Court had before them a suit to set aside two mortgage bonds for one thousand five hundred rupees executed by the Karnavan in fraud of the family. In their judgment occurs the following passage:—

"It is an established rule that the lands of a tarwad, though they may be mortgaged, cannot be alienated by the Karnavan

(*a*) Report by Major Walker on the land tenures of Malabar, dated the 20th July, 1801.

(*b*) A. S. 70 of 1816, Provincial Court, Western Division.

(*c*) S. A. 27 of 1839, Provincial Court, Western Division.

(*d*) A. S. 18 of 1854 and A. S. 38 of 1854, Tellicherry Civil Court; Zillah Decisions, August 1854, p. 17, June 1855, p. 13.

without the consent and signature of the Anandravan, and this rule alone would render null and void upon principle the mortgage under consideration, for, with reference to the amount, it is not obvious how its recognition should have any other effect than that of depriving the respondents of their patrimony" (*a*).

In 1855 Mr. Holloway, as Sub-Judge, Calicut, enunciated the law thus :—

"The principle upon which restriction is placed upon the right of a janmi to dispose is that, in fact, the law regards all the descendants of the common ancestor in the female line as joint tenants of the property whose assent must be procured to the alienation, or at all events, it must be shown that the alienation was for a proper purpose and for the common benefit. . . . . The right of gift and the right of sale are on precisely the same footing" (*b*).

In remanding Oomaya *v.* Poker the Sudder Court, Strange and Beauchamp, JJ., observed as follows :—

"A Karnavan may not alienate family property without the written consent of his chief Anandravan and, where he has parted with his title to property by his own act under the circumstances that none of his Anandravans were of age to join him, it should be satisfactorily shown that the deed was for the benefit or necessities of the family" (*c*).

In two cases decided by him in 1858 and 1862 Mr. Holloway, as Civil Judge, Tellicherry, held that an outright sale of property cannot be made without the assent of the senior Anandravan and, that union of the senior of the junior members in the sale is, in the absence of evidence to the contrary, satisfactory evidence that the sale was made for family purposes and with an enlightened view to the family interests (*d*).

In Edathil Itti *v.* Kopashon Nayar, the High Court (Scotland, C. J., and Strange, J.), in deciding that a

(*a*) A. S. 5 of 1845, Sudder Adalat, dated 28th April 1860.

(*b*) A. S. 282 of 1855, Calicut; Zillah Decisions, July 1857, p. 6.

(*c*) A. S. 108 of 1857, Civil Court, Tellicherry.

(*d*) A. S. 137 of 1858 and A. S. 169 of 1862, Civil Court, Tellicherry.

Karnavan singly had authority to create an otti mortgage, held that in the case of a sale, it was requisite that the senior Anandravan should, if *sui juris*, concur in the conveyance (*a*).

In Kondi Menon *v.* Sranginreagatta Ahammada, the High Court (Frere and Holloway, JJ.) expressed themselves as follows :—

"All that is necessary is that the sale should be made with the assent, express or implied, of all the members of the tarwad and that the Karnavan and the senior Anandravan, if *sui juris*, should join in the deed of sale. Such assent will be implied where, as in the present case, the sale is found to have been for the benefit of the family. Here the District Munsif and the Civil Judge have also found that the Karnavan and the senior Anandravan executed the deed. Such execution is *primâ facie* evidence of the assent of the whole family. The onus of proving their dissent rests on those who deny their assent" (*b*).

In Kaipreta Ramen *v.* Makkayil Mutoren, the High Court (Phillips and Holloway, JJ.) say :—

"The sale by a Karnavan of tarwad land requires, no doubt, the assent of the Anandravans, but the signature of the chief Anandravan, if *sui juris*, is sufficient evidence of the assent of himself and the rest to the sale, and throws the burden of proving dissent therefrom on him who alleges such dissent The assent of the Anandravans, however, may be proved by means other than the signature of the senior and in the present case, where the Court has found that the plaintiff, an Anandravan, was present and assented to the sale, he clearly has no ground for this appeal" (*c*).

And, in Koyilothputen Purayil Manoki Koran Nayar *v.* Puthenpurayil Manoki Chanda Nayar, the High Court (Holloway and Innes, JJ) gave judgment as follows :—

"The fact that the property was tarwad property is undisputed. It is the unquestionable law of Malabar that such

(*a*) I Madras H. C., 122.
(*b*) I Madras H. C., 248.
(*c*) I Madras H. C., 359.

property is inalienable, that the eldest member holds it for the support of the members of the family. It is equally clear that, on the establishment of an adequate family necessity, alienations will be upheld, but it lies upon the purchaser to make out, with abundant clearness, that the purpose was a proper one. The alienation in the present case was, on its face, an improper one, inasmuch as it is not pretended that there existed the slightest consideration for Chandu Nayar's agreement except the desire to provide for the maintenance of the members of the family.

"The proper mode of providing such maintenance was from the income and a case is scarcely conceivable in which a mere voluntary alienation of the *corpus*, subject to the claims of all the members, to some of those members could be upheld. Equal dealing is the duty, all are equally entitled to support and such an alienation is manifestly a fraud upon the rule of law. This would be sufficient for the disposal of the present case It was a voluntary alienation to two members of the family of that which the Karnavan was bound to conserve in his own hands and transmit so far as possible unimpaired to his successor for the maintenance of all the members of the family.

"In this particular case, therefore, it is not strictly necessary to deal with the opinion expressed by the Munsif as to the signature by the next senior member. As, however, the effect of such signature does not seem to have been very clearly apprehended, it will be well to make a few observations upon it. *Primâ facie*, it lies upon the purchaser of family property to show that the alienation was made for proper purposes. The assent of the senior Anandravan is some evidence that the purpose was proper and may have more or less effect upon the conclusion according to the circumstances of the case, such signature would, however, have by no means prevented the dissentient members from showing that both the Karnavan and his apparent successor have really violated their duty. It would however render it unquestionably difficult to give relief against *bonâ fide* purchasers not affected with notice. At the same time, the state of Hindu families is so well known, the consulting of all the members so easy, that it would perhaps not be difficult to conclude that there is an obligation upon a

purchaser to inquire and that he would be affected with notice by much slighter evidence than a purchaser in other countries. The reason of requiring the assent of the member next in age is the supposition that he, at all events, is interested in guarding in its entirety the property of which he is to succeed to the management. When, however, as in the present case, he, as well as the Karnavan, belongs to the branch improperly benefited, the reason of the rule no doubt fails, and little or no weight ought to be attached to his junction. It is peculiarly important in a country like Malabar, in which a Karnavan's duty is in habitual conflict with his private affections and interests, that the Courts, bound to maintain the law, should not deviate from established principles.

"It is not however the law that assent can be proved by the signature only, although undoubtedly Courts, having experience of the extreme love of documentary evidence among the people of Malabar, would probably be slow to give credit to oral evidence that a man who had not signed had been present at the execution and assented. It is however no absolute rule of law that there must be written assent as this Court laid down in a reported case" (*a*).

In Kalliyani *v.* Narayana, the High Court (Muttusami Aiyar and Hutchins, JJ.) refer to two of the decisions in the first volume of the Madras High Court Reports that have been now quoted and hold that there is no rule of Malabar law that the assent of every member of a tarwad is necessary to render valid the alienation of tarwad property. The judgment is as follows:—

"This appeal relates to that part of the Subordinate Judge's decree which adjudges the sale to be invalid. The doctrine on which the Subordinate Judge proceeded is 'that no Karnavan or any number of Anandravans can permanently alienate tarwad property against the will of any single member of the family.' If that rule holds good, a single factious Anandravan may bring about the ruin of the whole family, for cases may occur in which an outright sale of part of the property may be by far the most prudent course, and indeed

(*a*) III Madras H. C., 294.

absolutely essential for the preservation of the remainder. It appears to us that the rule that every member of the family must assent is by no means an unqualified one. Certain sections of Strange's Manual have been referred to where, after quoting an authority to the effect that the written assent of the chief Anandravans is necessary, the learned author mentions a judgment of the Zilla Court in which it was held that the absence of concurrence of one living in discord with the Karnavan would not vitiate the alienation (*a*). In the two cases which have been quoted, Kondi Menon *v.* Sranginreagatta Ahammada (*b*), Kaipreta Ramen *v.* Mukkayil Mutoren (*c*), Mr. Justice Holloway referred, in general terms, to the rule of law as one requiring the assent of all members of the tarwad, but in both the appeal of an alleged dissentient was dismissed, and we do not find that it has ever been determined that the rule is invariable. In our opinion the factious or capricious dissent of a single Anandravan ought not to be allowed to invalidate a sale made in pursuance of the decision of a family conclave, and which was either absolutely necessary, or the most reasonable and prudent arrangement for the protection of the other family property" (*d*).

It is hardly necessary to produce any authority for the proposition that sales by a person against whom a decree has been or is about to be passed and sales by husband to wife or father to children will always be regarded with the utmost suspicion. Such transactions are by no means uncommon in Malabar and are generally held to be fraudulent transfers whether they are in the form of gifts, sales or mortgages.

Perpetual leases of property and leases for a long term of years occupy a position midway between gifts and sales on the one hand, and mortgages and simple debts on the other.

In Ponambilath Parapravan Kunhamod Hajee Ponambilath *v.* Parapravan Kuttiath Hajee the High Court

(*a*) Strange's Manual of Hindu Law (2nd edition), ss. 390 and 391.
(*b*) I Madras H. C., 248. (*c*) I Madras H. C., 359.
(*d*) I. L. R., IX Madras, 266.

(Turner, C. J., and Muttusami Aiyar, J.) had before them the question whether a Karnavan had authority to make a lease for ninety-nine years. After dealing with the general powers of a Karnavan, the Court say :—

"We have not been able to ascertain that the Karnavan has ordinarily power to make any other dispositions of property than such as are sanctioned by local usage, and although this Court ought, so far as it is justified in so doing, to construe liberally the powers which managers are competent to exercise so as to enable them to deal with tarwad property as it would be dealt with by a prudent owner for the benefit of the family, and to interpose no unnecessary obstacles to the employment of property in new industries, in so doing it undertakes what in some cases may be no easy duty, the determination of what acts are and what are not beneficial, and it cannot lose sight of the fact that the office of Karnavan is fiduciary, and that a Court has no authority to confer on Karnavans larger powers than such as are sanctioned by usage."

* * * *

"No evidence has been adduced in this case which would warrant us in finding that by local usage the Karnavan has such power, and the Subordinate Judge states that he is not prepared to hold it to be within the ordinary powers of the Karnavan. Nevertheless had the decision of the present appeal turned on this point, we should have been disposed, in view of the importance of the question, to direct further enquiry.

"Leases for long terms may be detrimental, if not to the present owners of an estate, at least to their successors. Leases whereby at the end of the term the properties are returned to the owners deprived of much that constituted their value, as by the denudation of forests or exhaustion of mines, may be highly detrimental. On the other hand, leases for long terms may not only be beneficial to the present owners of property, but equally or even more so to their successors, and, unless a long term is granted, it may be impossible to secure these benefits. Building leases are probably unknown in Malabar, but they afford an illustration. Ordinarily a lessee will not take such a lease except for a long term of years, but conditions are introduced which not only secure to the owners rent as high or higher than

would be paid for the use of the land for agricultural purposes, but to the successors of the owners the reversion of the property with its value greatly enhanced.

"But although building leases may be unusual, if not unknown, in Malabar, there might probably be found there, as are found in other parts of India, leases granted for long terms of years to secure the reclamation of land and the conversion of an estate, which at present brings but small returns, into an estate yielding a gradually increasing rental and reverting to the owners with its value greatly enhanced. The lease which the appellant has obtained from the Karnavan is a lease for cultivation, and it is argued in support of it that it is beneficial to the family. There is no proof of any family necessity to justify it, and the sole ground on which it can be supported, if it is within the powers of the Karnavan to grant so long a term, is that it is such a lease as would be made by a prudent owner. If, on the face of it, and on reference to the circumstances, it appeared to be so, we should, as we have said, have directed further enquiry as to local usage. But the lease on the face of it is not such as any prudent owner would enter into" (*a*).

With reference to these observations, it is submitted that a permanent lease, and *à fortiori* a lease for a long term, are within the powers of a Karnavan, if shown to be clearly beneficial to the tarwad but not otherwise.

Building leases, where the land with the buildings on it revert to the lessor are, it is believed, unknown in Malabar. The only building leases recognized are where a site is leased out and the tenant erects his house. In such cases it is held that there is an implied contract to compensate the tenant for the buildings erected by him, if reasonable.

Even where a house worth three thousand rupees had been erected on a waste paramba given by the head of a tarwad to his wife, the High Court (Kindersley and Muttusami Aiyar, JJ.), in Dhathri *v.* Pattiadi, refused to allow the tenant to be disturbed without receiving compensation, although the plaintiff sought to set aside the alienation of the sight as prejudicial to the interests of the tarwad (*b*). In

(*a*) I. L. R., III Madras, 169. (*b*) S. A. 361 of 1880, H. C.

adopting this course, the High Court, it may be surmised, acted rather on general principles of equity than on any special custom of Malabar.

Reclaiming leases are very common in Malabar. Occasionally they are in the form of perpetual leases, but no instances can be recalled in which the right of the tarwad to the reversion was reserved without payment of compensation. They are, however, in one sense, beneficial to the tarwad, inasmuch as lands which formerly yielded no rent now yield at least a small rent, and, in some instances, a fine or premium has to be paid at the end of every twelve years.

(2) As the manager of the family property, the Karnavan has authority to pledge the credit of the family for necessary purposes, but it cannot be held that the family property is liable to be dissipated by enforcement of decrees against the Karnavan for any simple debt of whatever character contracted by him. The question as to the person on whom in any practicular case the burden of proof lies as to the necessity of a loan to a Karnavan depends on the circumstances of the case and not on any presumption arising out of Malabar institutions.

The leading case in the Sudder Court on the subject of the liability of the family for debts incurred by the Karnavan is Pungoo Uttchen *v.* Charles Fell (*a*). A suit had been brought in the Provincial Court, Western Division, by a Mr. Fell to recover from the family of one Pangi Achen a sum of Rs. thirty-three thousand rupees alleged to be due under certain timber contracts entered into with him as Karnavan of his tarwad. The defendants contended that they were not responsible for the debts of Pangi Achen which were not for the benefit of the family, and that Pangi Achen had no authority to alienate indefinitely the right of cutting timber in the forests.

In the Provincial Court a decree was passed against the share of the family property which, on division, Pangi Achen would have been entitled to. It had been pre-

(*a*) A. S. 69 of 1844, Sudder Adalat.

viously held by the Sudder Court, in Cheru Amma *v.* Ramara Nambiar (*a*), that the property of a Malabar tarwad was impartible, but no reference was made to that decision.

On appeal the Sudder Court remanded the suit with the following observations :—

"The grounds on which the Provincial Court refused to make the whole of the members of the tarwad responsible for the contracts entered into by the deceased Pangi Achen, while Karnavan of the family, are that the plaintiff had failed to prove that the debts contracted by the said Pangi Achen had been incurred for the joint benefit of the family or that, previously to the contracts being entered into, the whole of the members of the family had been consulted and had signified their concurrence in their terms."

"It is customary in Malabar that the affairs of the family should be managed by the chief member of it, and, unless some positive unfairness or fraud should be discovered in a transaction of a pecuniary nature into which the Karnavan may enter, the whole of the members of the family are bound by his acts."

"The Court of Sudder Adalat believe that it is on no occasion customary to call together the whole of the members of the tarwad and obtain their sanction to any agreement into which the Karnavan is about to enter. There is that confidence throughout the province that the subordinate members of the family will both sanction and support whatever their chief may do, that agreements are without hesitation entered into with him, although they involve every member of the family in their terms."

"The plaintiff asserted this to be the principle on which the contracts were entered into generally in Malabar, and on it he contended for the liability of the defendants to fulfil the agreements made by Pangi Achen. The defendants denied the principle and maintained that the approval of all the members was necessary. Here then the parties were at issue on a most important point in which the local custom of the province was in question, and on which the Court was bound to require them to offer evidence."

(*a*) A. S. 28 of 1814, I Sudder Decisions, 118, Chap. V.

"With reference to the first ground stated by the Provincial Court for their decree, that the plaintiff had not proved that the contracts entered into were beneficial to the tarwad in general, the Sudder Adalat are of opinion that this was a point which the plaintiff could not have been required to prove. It was sufficient that he should show by evidence that the contract on which his claim was founded had been entered into by the head of the family in a fair and open way forbidding the thought of secrecy, and that he had fulfilled his part of the contract by making the advances for which he had stipulated. If in opposition to this the defendants could show that the kararnamahs were of such a nature that they could not have been entered into for the benefit of the family, it became their province to adduce evidence to establish it."

"The plaintiff declared that the contract had been entered into in the presence of the Munsif of the District and other influential and respectable persons."

"The publicity thus given to the transactions would seem to forbid the notion that anything like unfairness was to be discoverd in them. The Provincial Court was bound to examine all the persons who were then present, and to ascertain whether they considered the contracts to be fair to both parties entering into them."

"If the transactions obtained such publicity, it must be supposed that the whole of the members of the tarwad, were fully aware of them and that they at least tacitly acquiesced in them."

The suit was re-heard by the Special Commissioner, Mr. Waters, who laid down the following propositions of law :—

(1) Family property is not liable for debts contracted by a Karnavan or manager when such debts are not contracted for the benefit of the family.

(2) To maintain that a Karnavan cannot, without the presence and approbation of his Anandravans, who may be at variance among themselves, borrow a sum of money for necessary or profitable expenditure, is to depose him from his office and to neutralize his powers.

And then, proceeding to apply that law, he held that the money advanced to Pangi Achen was in the nature of a mercantile transaction, which was calculated to be beneficial to the tarwad, and that it was no defence to the suit to prove that the income of the tarwad was large and that there was no necessity to borrow or to enter into the contracts He accordingly decreed for plaintiff against the defendants out of the estate belonging to the tarwad.

The Sudder Court approved the law as laid down by Mr. Waters and concluded their judgment in the following words:—

"The Court are firmly of opinion that, both in equity and in law, the several members of the tarwad are liable for the debt. It was impossible that the contract should have existed without their knowledge and the contract was obviously for their benefit. It was clearly proved that it was entered into openly, its circumstances were known, and there is not the least reason to suppose collusion."

The principle of that decision was again affirmed by the Sudder Court in Ahmood Koothy Hajee *v.* Koonhum Bee to which reference has already been made. That was a suit to set aside two mortgage bonds for fifteen thousand rupees as fraudulent. The Court said:—

"It is open to a Karnavan of a tarwad to raise money upon mortgage without procuring the signature of the Anandravan to the bond. Were it not so, his management would in very many cases be merely nominal. It is, however, absolutely necessary, when such transaction takes place, that it should be for the good of the tarwad or family, and that it should be divested of deceit and fraud" (*a*).

But in Cootty Ally *v.* Cootty Ellea, which was a suit for money due under a mortgage deed executed by the Karnavan, Mr. Strange thus lays down the law:—

"It now remains to be determined whether the consent of the defendants as co heirs with Moosa was necessary to give

(*a*) A. S. 5 of 1845, Sudder Adalat; O. S. 28 of 1842, Provincial Court of Western Division.

validity to the transaction upon which the plaint is founded. The Court is of opinion that their consent thereto was requisite. The reason, in pursuance of which the consent of the anandravans is always required, is that all are held to have a common interest in the family possessions, and, therefore, although the active management thereof is to be under the government of the senior member, the anandravans are to have a voice in transactions affecting the property in order to prevent him from forwarding his own interests at the expense of theirs."

This decision was confirmed by the Sudder Court on the 31st December 1847, apparently without reference to the former decisions (*a*).

In a suit of 1844 the Sudder Court held that tarwad property was not liable for a debt contracted by the head of a tarwad for his own use (*b*) and the same principle was again affirmed in the judgment in Sanamby *v.* Coonhy Pucky passed in 1856 (*c*).

In Moideen Cootty *v.* Macatchy Coonjee the Sudder Court gave judgment as follows:—

"Property belonging to a tarwad is answerable for debts contracted by the Karnavan or managing member, unless it can be clearly and satisfactorily proved that they were not contracted for the benefit of the tarwad. The formal consent or signature of the other members of the family is not necessary to render a bond or other document executed by the said Karnavan valid and binding on them if it is a *bonâ fide* transaction done with their knowledge or consent or for their behoof" (*d*).

In 1853 the Government communicated to the Sudder Court an extract from the report of the Special Commissioner in Malabar (Mr. Strange), dated the 25th September, 1852, containing suggestions on the subject of tenant right and the tenure of family property in Malabar. The

(*a*) A. S. 29 of 1846, Sudder Adalat; O. S. 259 of 1842, Auxiliary Court of Malabar.

(*b*) A. S. 37 of 1844, Sudder Adalat.

(*c*) S. A. 95 of 1856, Sudder Adalat.

(*d*) S. A. 38 of 1852, Sudder Adalat.

Special Commissioner considered that a practice had grown up, inconsistent with the current usage of the country, of making family property liable for the debts contracted by individual members of it other than the Karnavan or managing member. The Sudder Court, after consulting the Civil Judges of Tellicherry and Calicut, passed Proceedings on the 13th February, 1854, from which the following is an extract:—

"In regard to the liabilities of families governed by marumakkathayam usage, the Court deem it proper to observe that it is clearly an error to presume that each member of a family is possessor of an individual share in the estate available for the discharge of his debts, the rule being that in all such families the family property is only liable for obligations incurred by the head of the family and for its uses."

The law is thus summed up by Mr. Justice T. L. Strange, in his Manual of Hindu Law :—

"The Karnavan can alienate all movable property, ancestral or self-acquired, at his discretion. But as to immovable property, whether self-acquired or ancestral, he must have the written assent of the chief anandravans."

"The absence of concurrence of an anandravan living in discord with the Karnavan, would not, however, vitiate the act of the Karnavan in alienating immovable property, the rule requiring the assent of the anandravans to such alienation implying that the family is a united one."

"A Karnavan may raise money on mortgage for the use of the family without the assent of the anandravans. It is only in making absolute alienation that their concurrence is necessary."

"The signature of the anandravans is not required to give validity to bonds executed by the Karnavan."

"Debts to be chargeable on the family property must have been contracted for the uses of the family by the Karnavan or other member managing under his sanction. The debts of individual members cannot be charged on the property."

"The family property is not liable for a debt contracted by the head of the family for his own use."

"The debtor's estimated share in the family property is not liable for individual debts."

"A debt contracted by a Karnavan would be presumed to have been for the uses of the family and chargeable on the estate until the contrary might be shown, and one by an anandravan would be presumed to have been an individual obligation not so chargeable unless otherwise proved" (*a*).

In 1856 Mr. Holloway, as Sub-Judge of Calicut, thus dealt with a case in which it was sought to set aside an attachment in execution of a decree against a Karnavan.

"The borrower was the Karnavan of plaintiff's tarwad, as is admitted by all, and his loans must be taken to be for tarwad purposes until the contrary is proved. Nothing is heard of his misbehaviour until he is in his grave, and, if affirmative proof of the propriety of the purpose were, as it is not, required, the long silence of the members of the family would afford it. It is quite true, and does not require the quotation of cases to establish it, that a private loan to a Karnavan will not be satisfied from the family property, but the position of the Karnavan dealing with all the property and protecting the subordinate members requires the burden of proving that his debt is a private one to be laid on those who assert it. This is a presumption no less necessary to the well-being of the family itself than to the protection of honestly dealing third parties. Who would supply the pressing, perhaps temporary, wants of a family if liable to be defrauded of his rights by the sudden death of the borrower, unless he could do by evidence, what would indeed be impossible, follow the money lent to the purposes to which it was applied, and show that the object was one which specifically benefited the joint community? This is not necessary and not being necessary, the appeal fails" (*b*).

And in another case in 1857 Mr. Holloway, as Sub-Judge of Calicut, laid down the law thus :—

"Now the rule of law is plain that a Karnavan can burden the family property without the consent of any member and, if the members deny that the purpose is a proper one, the

(*a*) Manual of Hindu Law, by T. L. Strange, 2nd edition, 1863, p. 97.

(*b*) Calicut Zillah Decisions, October 1856, p. 23.

burden of proving the impropriety lies on them, in the absence of such proof, the purpose must be presumed proper and the encumbrance binding" (*a*).

Again and again the Sudder Court and Mr. Holloway, as Civil Judge of Tellicherry, reiterated the principle that, in the absence of evidence to the contrary, a debt contracted by a Karnavan is presumed to be a family debt. Singularly enough, in the eight volumes of the Madras High Court Reports, no express decision is to be found. But the law on the subject was too well-known to be disputed, and the whole current of decisions since the Sudder decision of 1862, *i.e.*, for a period of twenty years, proceeded uniformly on the same lines.

In Kutti Mannadiyar *v.* Payanu Muthan, the High Court (Innes and Kindersley, JJ.) however, ruled that there was no such presumption of law. They held as follows:—

"Upon the evidence already recorded, the Judge concluded that the loan was made under circumstances which would render it binding on the tarwad. But in coming to this conclusion, the learned Judge held that every debt contracted by the Karnavan is presumed to be for the uses of the family and chargeable on the family estate until the contrary is shown, and the objection has been taken that the Judge has thrown the burden of proof on the wrong party.

"We are not prepared to adopt the learned Judge's opinion as to the presumption in the very broad terms in which it has been laid down. Whatever may be the powers of a Karnavan in the management of the property of the tarwad, it is clear that the Karnavan cannot, without the consent of the members of his tarwad, bind them to pay his private debt. In many cases, the surrounding circumstances, in the absence of direct evidence, may tend to show the purposes for which the debt was contracted. But, in the absence of all evidence, we are not aware of any presumption of law that a debt contracted by

(*a*) A. S., 362, 370 and 371 of 1855, Calicut Zillah Decisions, March 1857, p. 20.

a Karnavan was contracted on behalf of his tarwad. In such a case, it is for the creditor to show, if it is disputed, that the obligor had authority from the family as their agent or manager to contract debts and that he assumed to act in the particular instance as such agent or manager. When this is shown, it lies on the family to show that in the particular instance, the obligor was not acting within the scope of his authority"(*a*).

The whole question as to the person on whom the burden of proof lies as to the necessity of a loan made to a Karnavan was very fully considered by the High Court (Innes and Muttusami Aiyar, JJ.) in Kombi Achen *v.* Lakshmi Amma. In that case the junior members of the family brought a suit to set aside a sale of family property in execution of a money decree obtained against the Karnavan. Both the lower Courts found that the sale was valid and dismissed the suit. The Judges of the High Court, when the case came in the first instance before them, observed:—

"According to what we have always regarded as a most erroneous practice, the Courts below, in executing the decree, went into the question of what the decree meant beyond what it plainly said."

"The decree made the 1st defendant liable. The 1st defendant happens to be also the Karnavan of the plaintiff's tarwad. The Courts therefore construed the decree as a decree against the tarwad when, on the face of it, it was not so and sold up the properties of persons who were no parties to the decree. In the suit brought by these persons, they do not put their claim to recover expressly upon the ground that the decree does not make them in terms answerable and they have gone to trial upon the following questions which do not properly arise in such a suit," *viz.*:—

"Whether the sale for which the debt was made was binding on the tarwad property?"

"Whether there was due notice given to the public and to the defendants of the karar alleged by the plaintiffs in the plaint as binding on 1st defendant?"

(*a*) I. L. R., III Madras, 288.

"Whether 1st defendant has been acting upon the contract that has been executed?"

"The two last issues referred to allegations on the part of the plaintiffs that the Karnavan's authority had been expressly limited by the other members of the tarwad."

After proceeding to state that all that was purchased was simply the right, title and interest of the judgment debtor, that the judgment debtor was 1st defendant alone, that his interest was all that was or could be sold under the decree, that the purchaser was not in any way led to suppose that he purchased more than the interest of the judgment debtor and was not therefore a sufferer, if his right of purchase was strictly confined to the right of the judgment debtor in the property, the Judge's observe :—

"It is true that in a case of this kind, Deendyal Lal *v.* Jugdip Narain Sing, (*a*) what was the character of a debt is not the real question, which is simply what passed under the sale in execution of the money decree, but the plaintiffs have gone to trial on the footing that they will consider the decree and all the proceedings in execution binding on them, provided that it is shown that the debt was incurred for family necessities, and we think it would not be doing justice between the parties if we insisted on a stricter rule in their favour."

"We shall remit to the District Court the issue as to the character of the debt and also require a more precise finding upon the other questions. The issues we remit for trial are:"—

"(1) Was the debt for which the decree was obtained against 1st defendant incurred for the benefit of the family or for proper family necessity or purpose, or did the lender make enquiry and satisfy himself that the money was borrowed for proper tarwad purpose?"

"(2) When the debt was incurred, had the Karnavan authority to borrow the money for the tarwad without the consent of the members of the tarwad?"

"(3) If the authority of the Karnavan was limited, had the lender (2nd defendant) notice of the limitation of authority."

(*a*) L. R., IV I. A., 247.

The District Judge found on the issues sent down to him for trial that there was no consideration for the bond upon which the decree was obtained. On receipt of this finding the Judges of the High Court proceeded to dispose of the several questions raised before them as follows :—

"It is contended that it is not competent to the Courts to go behind a decree against a Karnavan ; and that such a decree, by virtue of the position of the Karnavan, is binding on the tarwad in the absence of fraud. We do not find that the decisions go to the length contended for In the case referred to by the District Judge, Moideen Cooty *v.* Macatchy Coonjee (*a*), it is said that property belonging to a tarwad is answerable for debts contracted by a Karnavan unless it can be clearly and satisfactorily proved that they were not contracted for the benefit of the tarwad."

"If this decision is to be followed, it impliedly negatives the right of a creditor to charge a tarwad where evidence is given on the part of the tarwad that the debt contracted by the Karnavan was not for proper family purposes. In the litigation with which that suit was connected, the position of the parties was similar to what it has been in the litigation in the case before us. There had been a decree against a Karnavan, and, on the creditor executing the decree, other members of the tarwad came forward to question the liability of the tarwad for the debt in respect of which the decree had been obtained. It was decided in an earlier case in 1844 that the family property is not liable for a debt contracted by the head of the family for his own use (*b*). The recent decision to which we were referred, Varanakot Narayana Namburi *v* Varanakot Narayana Namburi and others (*c*), was a case in which a Karnavan had been sued in respect of certain property in possession of the tarwad, which, in the result of that suit, was found to be the janmam of the therein plaintiff, the tarwad having only a kanam right over it. That was a decree against the Karnavan, and in a suit by an anandravan of the tarwad to set it aside and to have it declared that the Karnavan had acted fraudulently and collusively with the plaintiff in

(*a*) S. A. 38 of 1852. Sudder Adalat.

(*b*) R. A. 27 of 1844, Sudder Adalat. (*c*) I. L. R., II Madras, 328.

defending a former suit, it was held that the plaintiff was bound by the decree in that suit, fraud or collusion not being shown. There was the additional circumstance in that case that the plaintiff had himself assisted in defending the suit, and might have applied to be made a defendant, but had not done so. That case is an authority for saying that a decree against the Karnavan, the recognized manager of the property in respect of which he is sued, when the suit has been *bonâ fide* defended on behalf of the other members of the tarwad, is binding on them."

"That is a very different thing from saying that a decree against a Karnavan in a suit against him to recover a mere debt is binding on the tarwad in the absence of fraud or collusion."

"The earlier cases referred to are distinct authorities for the position that a tarwad is not bound to satisfy such a decree, if it can be shown that the debt was a personal debt of the Karnavan or was not contracted for the uses of the tarwad. The District Judge observes, in regard to the judgment of the High Court remitting the issue, 'In conclusion, I trust I may be pardoned if I offer one or two observations on the *dicta* of the High Court contained in the earlier part on their judgment. The doctrine affirmed, if I understand it rightly, is that a decree against a Karnavan is a personal decree and is not binding on the family, and that the Courts are not at liberty to go behind the decree, I respectfully submit that this is opposed to the current of decisions for the last forty years. It would be impertinent on my part to enter into any discussion as to what was the actual decision in Deendyal Lal *v* Jugdip Narain Sing (*a*), but I venture to submit that the *ratio decidendi* in that case was that each member of an undivided family has a definite share, which can be ascertained by partition, and that the reasoning is inapplicable when, as in Malabar, partition cannot be enforced by suit'."

"'I will pass over the argument, which, however, appears to me to be a sound one, that if, as has been frequently held, a Karnavan has implied authority singly to create encumbrances binding on the family property, *à fortiori* he has a right to contract simple debts which will bind the family'."

(*a*) L. R., IV I. A., 247.

" We did not intend to imply in our judgment that individual liabilities against a person could be enforced by sale of the tarwad property to the extent of that person's interest in the property, but that, peculiar customs notwithstanding, the rules of procedure binding on the Courts elsewhere are equally binding in Malabar."

* * * *

" The authority of a Karnavan to make alienations of the immoveable family property stands upon a different footing from his power to pledge the credit of the family. The former power is not unlimited. The assent of the other members of the family must be shown to the particular alienation. The assent of the senior anandravan is regarded as sufficent evidence of the assent of the family. The Karnavan is not therefore the agent of the family to make alienations, but must have special authority in each case. As the manager of the family property he has authority to pledge the credit of the family for necessary purposes, but it would be too much to hold that the family property is liable to be dissipated by enforcement of decrees against the Karnavan for any simple debt, of whatever character, contracted by him. The result would be that, though tied down by the rule which requires him to have the assent of the members of the tarwad to an alienation of immoveable property, the Karnavan might enter upon a career of extravagance and ruin the tarwad by suffering involuntary alienations of the tarwad property in execution of decrees against him."

" In matters of contract the Courts are not bound by Hindu law, nor are we aware of any peculiar law or custom of Malabar which does or ought to displace the ordinary rules of evidence as to proof of the liability of principals for acts of their agents. It depends on the circumstances, and not on any presumption invariably arising out of Malabar institutions, on whom, in any particular case, the burden of proof lies as to the necessity for the loan. No invariable presumption, therefore, ought to be applied to the settlement of such questions" (*a*).

(3) A bona fide creditor is protected, if after due enquiry, he satisfied himself that the money was required by the Karnavan, for a family purpose.

(*a*) I. L. R., V Madras, 201.

As to the nature of the enquiry, reference must be made to the leading case in the Privy Council known as Hunoomanpersaud *v.* Babooee (*a*).

This question in Malabar is not, as elsewhere, complicated by the right of the co-parceners to enforce partition and it would probably be held that the Karnavan far more nearly resembles the head of a patriarchal family than the managing member of an ordinary Hindu undivided family.

The same kind of enquiry will not be expected from an uneducated agriculturist who advances his money to his neighbour as from the professional money-lender.

The two last issues raised by the High Court in Kombi Achen *v.* Lakshmi Amma (*b*) appear to be precisely the issues which ought to be raised when the power of the Karnavan is limited by contract and the creditor professes ignorance of the limitation. In a case decided by Mr. Holloway, as Sub-Judge of Calicut, in 1855, he thus lays down the law :—

"It is here attempted by the plaintiff to avoid a transaction into which the legal representative of their family has entered and which, if nothing else existed in the case, would be binding upon them. Here, however, it is contended that in so contracting, their representative has violated a fundamental rule of coparcenary on which all the members are agreed I am clearly of opinion that such plea would not avail them as against a stranger. If they allowed their Karnavan to deal with the property, it would be concluded that he had full authority to do all things usually done by men in his position, and it would not be open to them afterwards to come in and say that they had enacted private rules limiting his authority as the rules in this case do. Here, however, there is something more in the case. The defendant makes the important admission that he knew of the existence of certain rules, but he merely disputes the accuracy of their representation by the plaintiffs. I am, however, clearly of opinion, that the defendant has no ground

(*a*) VI Moore's I. A., 393.

(*b*) I. L. R., V Madras, 201.

for this objection and agree with the Munsif that the rules produced are the ones enacted. We have here then the case of a man, who, having notice of the existence of rules, chooses to contract in defiance of them. Nothing would have been easier than for him to prove that he did not know of such rule, by the production of the kanam deed for fourteen thousand fanams admitted by the plaintiffs, and if it appeared that this was executed by the Karnavan in the ordinary manner, it would be a ready mode of disposing of the plaintiff's case. As the matter stands, however, I am clearly of opinion that the whole of the members of a family have a right by common consent to regulate the Karnavan's agency and that such regulations will be binding on all such as have notice, either express or implied, of their existence" (*a*).

In returning a finding on an issue referred to him as District Judge, in Madaren Nambudri *v.* Kakkunni Nayar, Mr. Wigram acted on the principle laid down by Mr. Holloway and the High Court (Innes and Muttusami Aiyar, JJ.) affirmed his decree (*b*).

It would of course be held that very slight evidence of notice was sufficient, and that notice included such knowledge as a party ought to have had if he had not wilfully abstained from making or grossly neglected to make due enquiry.

(4) The whole of the tarwad property is liable for a tarwad debt properly incurred by its head.

There have not been wanting attempts by the Courts to disregard the rule of impartibility and to hold the share of the individual liable for his individual debts.

In 1850, Mr. Forsyth, as Civil Judge of Tellicherry, held that it was the practice in Malabar to sell the share of a junior member of a Nambudri illam in satisfaction of his debts, and his order was confirmed by the Sudder Court in their Proceedings of the 9th December 1851.

(*a*) Zillah Decisions, Calicut Sub-Court, 1855, p. 19.
(*b*) S. A. 635 of 1880, H. C.

In their Proceedings of the 13th February 1854, however, the Sudder Court, reviewing Mr. Strange's report on Malabar outrages, upheld the ancient practice and laid down the rule in clear language (*a*).

In Coonhy Anandun *v.* Cunnen, the Sudder Court, in reversing a judgment of the Principal Sudder Ameen of Tellicherry, pointed out that, if the property to which that suit related had been purchased benámi in the name of the senior female, it was liable for tarwad debts, whereas, if it was the private property of the said female, it was not so liable (*b*).

And in Parrakel Kondi Menon *v.* Vadakentil Kunni Penna, the High Court (Frere and Holloway, JJ.) held that property assigned by the males of a Nayar family for the support of their females is still family property and liable as such to be taken in execution of a judgment against the Karnavan which was binding on the family (*c*).

The general rule, of course, is that junior members cannot claim adverse possession against the family. But there may be exceptions to that rule. In Kanara Paniker *v.* Ryrappa Paniker, the High Court (Turner, C. J., and Hutchins, J.) held that by openly asserting a hostile title to property in his possession, a junior member might after twelve years acquire a prescriptive title as against the tarwad. That was a case in which a junior member claimed by inheritance property acquired by the deceased head of his branch, and had retained possession since the acquirer's death and for more than twelve years. It was admitted that, on the acquirer's death, the property should have descended to the Karnavan of the tarwad and not to the acquirer's nearest anandravans (*d*).

The presumption against the liability of family property for a debt contracted by an anandravan is very stringent. The only exception to the rule is where the anandravan

(*a*) *Vide* p. 162, *ante*.

(*b*) S. A. 68 of 1857, Sudder Adalat.

(*c*) II Madras H. C., 41.

(*d*) I. L. R., III Madras, 212.

has been placed in the position of manager of a whole or part of the tarwad property and has been held out to the world as the *de facto* Karnavan. He will then be in the same position as one who combines the *de facto* with the *de jure* title.

This principle was recognised by the Sudder Court in 1847 (*a*) by Mr. Chatfield, as Civil Judge of Tellicherry (*b*), and in 1859 by Mr. Frere, as Civil Judge of Tellicherry (*c*).

In conclusion, the following passage from Mr. Mayne's Hindu Law may be quoted :—

"The liability of one person to pay debts contracted by another arises from three completely different sources which must be carefully distinguished. These are first, the religious duty of discharging the debtor from the sin of his debts, secondly, the moral duty of paying a debt contracted by one whose assets have passed into the possession of another, thirdly, the legal duty of paying a debt contracted by one person as the agent, express or implied, of another. Cases may often occur in which more than one of these grounds of liability are found co-existing, but any one is sufficient" (*d*).

In all the cases reviewed the legal duty is the sole ground of liability. The moral duty can only come into play if the tarwad has inherited the self-acquired property of one of its members.

(*a*) Proceedings of the Sudder Court, dated the 26th June 1847.
(*b*) A. S. 111 of 1856, Tellicherry Zillah Decisions, July 1857, p. 4.
(*c*) A. S. 226 of 1857, Tellicherry Zillah Decisions.
(*d*) Mayne's Hindu Law, 6th edition, p. 376.

CHAPTER VII.

SEPARATE AND SELF-ACQUIRED PROPERTY.

The self-acquisitions of an individual member of a Malabar family are at his absolute disposal during his life-time, and the last survivor of a joint family has the same power over the family property as if it were his self-acquisition. At the death of the acquirer all acquisitions, which he has not disposed of by gift or otherwise *inter vivos* and which he has not devised by will, form part of the family property. Under the provisions of Act V. of 1898 (Madras) every person governed by the Marumakkathayam law of inheritance may by will dispose of property which he could legally alienate by gift *inter vivos*.

(1) The self-acquisitions of an individual member of a Malabar family are at his absolute disposal during his life-time.

The earliest decision on the subject of self-acquisitions was passed in 1839 in the Provincial Court of the Western Division. The Court held that no Karnavan can alienate real property, whether acquired by himself or otherwise, without first obtaining the consent of his anandravan (*a*).

And again, in Cherry Coonhy Amod *v.* Poyilil Awolah, the Sudder Court (Hooper, Strange and Phillips, JJ.) held as follows:—

"It is immaterial in what way land is obtained in Malabar in a family governed by marumakkathayam the rule being that, however acquired by a member of the family, it becomes incorporated in the family possessions and is under all the restrictions as to alienation affecting such property" (*b*).

(*a*) S. A. 27 of 1839, Provincial Court, Western Division.

(*b*) S. A. 88 of 1859, Sudder Court.

In this case the dispute was between the son and the family of the acquirer.

The same principle was followed by the Sudder Court (Strange and Frere, JJ.) in Unichaten Nayar *v.* Manjolli Kome Nayar (*a*).

The first recognition of the right of an individual member to dispose of his self-acquisitions occurs in a judgment of the High Court passed in 1863 in which the Judges (Phillips and Holloway, JJ.) held that—

"Self-acquisitions of land by a member of a tarward are his separate property during his life and may be charged by him for his personal debts. After his death, they lapse into the tarward property, but, if accepted by the members, they carry their obligations with them."

The law was subsequently more fully laid down by the High Court (Scotland, C. J., and Holloway, J.) in Kallati Kunju Menon *v.* Palat Erracha Menon. The Court held—

"It is unquestionably the law of Malabar that all acquisitions of any member of a family, undisposed of at his death, form part of the family property, that they do not go to the nephews of the acquirer but fall, as all other property does, to the management of the eldest surviving male"

"It is, however, as unquestionable law that the acquirer is fully entitled to hold, encumber and dispose during his life-time of his self-acquisitions. That doctrine, of the soundness of which we entertain no doubt whatever, was laid down by this Court in a case, unfortunately not reported, and is unquestionably in accordance with usage, for in all the reckless litigation of Malabar, one member of the Court, with the judicial experience of several years, does not remember an instance of a Karnavan attempting to get into his own hands the self-acquired property of a junior member. That a Karnavan, who is in possession of the family funds, will be supposed to have made all acquisitions with them, and for the benefit of the corporate body, is unquestionable. It is also clear that it lies upon those

(*a*) S. A. 85 of 1860, Sudder Court.

who assert such self-acquisitions, to make them out by the most satisfactory evidence, so strong is the presumption in the case of a Karnavan against self-acquisition. When once established, however, we are perfectly satisfied that an alienation, charge or other disposition to take effect at once made during his life-time, will be perfectly valid " (*a*).

(2) The last survivor of a joint family has the same power over the family property as if it were his self-acquisition.

In 1855 Mr. Holloway, as Sub-Judge of Calicut, deals with the question whether a dayadi had a right to question a sale made by the last surviving member of a tarwad. He says:—

" If the deceased was the sole remaining direct heir of the common ancestor in the preferable line, the whole joint tenancy merged in her person, and she would be, as to the right of alienation, in precisely the same position as the absolute acquirer of the property, seeing that she is the final legal representative of such acquirer " (*b*)

And in Elayadeth Checkuth *v.* Krishen Mussad, the District Judge of South Malabar held that the last surviving member of a Brahman family might alienate his whole estate to his sister's son and that the alienation would operate as a *donatio mortis causâ* and could not be disputed by the dayadis and his decision was affirmed by the High Court (*c*).

(3) At the death of the acquirer all acquisitions, which he has not disposed of by gift or otherwise *inter vivos* and which he has not devised by will, form part of the family property.

The rule thus laid down in the case already quoted (*a*), which is the leading case on the subject, is undoubtedly in accordance with the ancient usage which regarded the family as an indissoluble unit and took no thought of the individuals composing that unit. A practice, however, appears to have sprung up of allowing self-acquired prop-

(*a*) II Madras H. C., 162.
(*b*) S. A. 285 of 1855, Calicut Zillah Decisions, 1857.
(*c*) S. A. 279 of 1878.

erty to pass to the nearer heir in preference to the head of the family. Thus a woman's children inherited her self-acquisitions and a man's self-acquisitions were inherited by his nearest anandravan for the benefit of his branch.

In 1852 Mr. Cook, as Sub-Judge of Calicut, held as follows :—

"According to the law of nepotism, a nephew may be heir to a Karnavan's private property, but as regards the tarwad property the eldest member of the tarwad is the rightful heir" (*a*).

Mr. Justice Strange in his Manual adopts the rule laid down by Mr. Cook as regards moveable property and observes :—

"Self-acquired moveable property, namely that which is obtained by individual exertion and without aid from the family funds, belongs exclusively to the acquirer, and may be disposed of by him at his pleasure. Females may hold it as well as males. On demise it descends, in the case of males, to their sister's sons, or nearest anandravans, and, in the case of females, to their issue male and female" (*b*).

It may be noted that the information given to Dr. Buchanan as to this was that in a Nayar family a man's moveable property was on his death divided equally among the sons and daughters of all his sisters. In this, as in many other cases, the probability is that there was no uniform custom till hard and fast rules were introduced by the Courts. The passage in Buchanan's work is interesting and may be quoted :—

"In consequence of this strange manner of propagating the species, no Nayar knows his father, and every man looks upon his sisters' children as his heirs. He, indeed, looks upon them with the same fondness that fathers in other parts of the world have for their own children, and he would be considered as an unnatural monster were he to show such signs of grief at the

(*a*) A. S. 320 of 1852, Calicut Zillah Decisions, 1853.

(*b*) T. L. Strange's Manual of Hindu Law, 2nd edition, s. 399.

death of a child, which from long cohabitation and love with its mother, he might suppose to be his own, as he did at the death of a child of his sister. A man's mother manages his family, and after his death his eldest sister assumes the direction. Brothers almost always live under the same roof, but, if one of the family separates from the rest, he is always accompanied by his favourite sister. Even cousins, to the most remote degree of kindred, in the female line, generally live together in great harmony, for in this part of the country love, jealousy, or disgust, never can disturb the peace of a Nayar family. A man's moveable property, after his death, is divided equally among the sons and daughters of all his sisters. His landed estate is managed by the eldest male of the family; but each individual has a right to a share of the income" (*a*).

It may also be mentioned, with reference to a question regarding which there has been much discussion, that what Dr. Buchanan was told was that a man's mother managed his family and, after her death, his eldest sister assumed the direction. He, however, adds that the landed estate is managed by the eldest male of the family. Nothing is said definitely as to what the respective powers of the senior male and the senior lady were.

Mr. Holloway did not, however, assent to the rule laid down by Mr. Justice Strange. In A. S. 366 of 1861 (Tellicherry) he held that property, whether self-acquired or otherwise, in the hands of an individual passed, at the moment of his death, to his family, and again in 1862 he laid down that the self-acquisitions of a Karnavan passed, at his death, to his family, and was not inherited by his nearest Anandravans and this decision was confirmed by the High Court (*b*).

Traces of the practice alluded to by Mr. Justice Strange and Mr. Cook still occasionally come under the notice of

(*a*) A journey from Madras through Mysore, Cannanore and Malabar, by Dr. Buchanan, Vol. II., pp. 95 and 96.

(*b*) Mayil Manikotha Kamaran *v.* Manikotha Cheriya Ryru, S. A. 98 of 1862 (H. C.).

the Courts. In Kandoth Chathu *v.* Chathu Nambiar the District Munsif found that there was a special custom in the family by which the self-acquisitions of a member of one branch of a tarwad became the property of the branch at the death of the acquirer and not the property of the tarwad. The District Judge, Mr. Reid, reversed the Munsif's decision, on the authority of Velia Kaimal *v.* Velluthadatha Shamu (*a*), and the High Court (Morgan C. J. and Innes, J.) on second appeal did not go into the question of custom (*b*).

In proceedings under Act XXVII of 1860 and Act VII of 1889 a custom of this kind has, on more than one occasion, been found to exist in particular families.

In Kanara Paniker *v.* Ryrappa Paniker a similar custom was set up, but not adjudicated on, the final Appellate Court holding that, by openly asserting a hostile title for more than twelve years, the Anandravans had acquired an independent title against the Karnavan (*c*).

In Vira Rayen *v.* the Valia Rani, the appellant probably intended to, though he did not directly, set up this custom. The High Court dismissed the appeal on the ground that he had failed to establish an independent title by adverse possession (*d*).

In Vasudevan *v.* the Secretary of State for India the High Court (Collins, C. J., and Muttusami Aiyar, J.) observed that among Nambudris "self-acquired property merges, on the death of the person acquiring it, into family property as is the case among Nayars" (*e*). Reference may also be made to Mr. Mayne's Hindu Law where the same view of the law is expressed (*f*). It is worthy of note that it has been held, in Antamma *v.* Kaveri, by the High Court (Turner, C. J., and Muttusami Aiyar, J.) that under

(*a*) VI Madras H. C., 401.

(*b*) S. A. 106 of 1877.

(*c*) I. L. R., III Madras, 212.

(*d*) I. L. R., III Madras, 141.

(*e*) I. L. R., XI Madras, 157.

(*f*) Mayne's Hindu Law, 6th edition, p. 300.

Alyasantana law the self-acquisitions of a member of a family governed by that law devolves on his death, not upon his family, but on his immediate representatives (*a*).

In a very recent case, Chemnantha Attekunnath Lakshmi Amma *v.* Palakuzhu Thuppan Nambudri, the question as to whether certain property that a Nambudri was alleged to have acquired in consequence of his Sarvasvadanam marriage into another illam lapsed on his death to his own illam was discussed. It was urged that under the ordinary Hindu Law such property would be inherited by the Nambudri's own immediate heirs and that it had never been held by the High Court that in this respect the law governing the Nambudris of Malabar differed from the ordinary Hindu law prevailing on the East Coast. As to this the judges (White, C. J., and Moore, J.) observed as follows :—

"There is much force in this contention. It does not appear to us that this question has ever been clearly and definitely decided by the High Court with reference to Nambudris. The decisions of the local Courts show that for many years there was no uniform custom as to the devolution of the self-acquired property of a member of either a Malabar tarwad or illam. As to this Mr. Justice T. L. Strange, who was employed for many years in Malabar, observes as follows in his Manual of Hindu Law (*b*) : 'Self-acquired moveable property, namely, that which is obtained by individual exertion and without aid from the family funds, belongs exclusively to the acquirer, and may be disposed of by him at his pleasure. Females may hold it as well as males. On demise, it descends, in the case of males, to their sister's sons, or nearest anandravans, and in the case of females, to their issue male and female.' Mr., afterwards Mr. Justice, Holloway, whose influence as District Judge of Tellicherry and subsequently as Judge of the High Court on the development of Malabar law as set forth in legal decisions can scarcely be over-estimated, did not accept this view. As Judge of Tellicherry he, in Mayil Manikotha

(*a*) I. L. R., VII Madras, 575.

(*b*) Manual of Hindu Law, 2nd edition, s. 399.

Kamaran *v.* Manikotha Cheriya Ryru (*a*) observed as follows : "The truth of the matter is that Kannen (the deceased Karnavan) acquired the property and, following the fallacy which is very prevalent, it has been supposed that his immediate juniors are those entitled to inherit it. It is unnecessary to say that this is not the law of Malabar, a law which I deplore as fruitful in mischief, but by which I am bound." On appeal this decision was confirmed by the High Court, but the Judges in dismissing the appeal wrote no judgment and recorded no reasons for their decision (*b*). In so far, however, as Nayars are concerned the law was clearly laid down in the case of Kallati Kunju Menon *v.* Palat Erracha Menon (Scotland, C. J., and Holloway, J.) as follows :—

"It is unquestionably the law of Malabar that all acquisitions of any member of a family undisposed of at his death form part of the family property, that they do not go to the nephews of the acquirer but fall as all other property does to the management of the eldest surviving male (*c*). This decision, which has been uniformly followed by the Courts, settled the law in so far as Nayar tarwads are concerned. With respect to Nambudris there is, however, no definite ruling of the High Court. In Vasudevan *v.* the Secretary of State for India (*d*) the learned Judges no doubt, in discussing certain questions regarding the personal law of Nambudris, observed that among them 'Self-acquired property merges on the death of the person acquiring it with family property as is the case among Nayars.' This observation, however, cannot be looked on as anything more than a mere *obiter dictum* as no question as to the self-acquisitions of Nambudris was then before the Court. The course of the decisions being as now set forth, we should certainly not be prepared to hold that it is not open to the appellants to contend that the self-acquisitions of Sankaran Nambudri passed on his death to his own immediate heirs and not to his illam, if this contention had been raised either before the Court of First Instance or the lower Appellate Court. From the records, however, it is clear that this plea was never even suggested till

(*a*) Appeal Suit No. 19 of 1862.

(*b*) Athalur Variatha Shangara Varier *v.* Manisherry, S.A. 98 of 1862, H.C.

(*c*) II Madras H. C., 162.

(*d*) I. L. R., XI Madras, 157.

the case came before us on second appeal. Such being the case we must refuse to refer this point, as we have been requested to do, to the lower Courts for inquiry and decision"(*a*)

(4) Under the provisions of Act V of 1898 (Madras) every person governed by the Marumakkathayam law of inheritance may, by will, dispose of property which he could legally alienate by gift *inter vivos*.

So far back as 1843 Mr. Strange held that a member of a Malabar tarwad who had acquired property was at liberty to dispose of his self-acquisitions by will. The Provincial Court objected to Mr. Strange's decision and referred the matter to the Sudder Court. The Sudder Court upheld Mr. Strange's view with the following remarks:—

"The property in the case under review appears to have been acquired, not inherited, and, as the Court have reason to believe that the customs of nepotism are neither uniform nor general in Malabar, they could not, for the sake of supporting a local and uncertain peculiarity, sanction a review of a judgment passed on clear and indisputable principles of equity. To establish the position claimed by Suban Kutti, and supported by the Provincial Court, the Sudder Adalat consider that it would have been necessary to have proved the existence of some title to the testator's property during his life and not to have supposed that the mere circumstance of death could originate a title which had previously no existence" (*b*).

In his later years, Mr. Justice Strange was strongly opposed to the recognition of Hindu wills as valid.

In their Proceedings of 13th February 1854, the Sudder Court admitted a special appeal against a decree of the Civil Court of Tellicherry on the ground that a Karnavan had no authority to will property to other than his heirs. That was apparently a case in which the person contesting the will was only a dayadi of the testator.

In Palikandy Mannan *v.* Palikandy Kelappen the High Court (Innes and Muttusami Aiyar, JJ.) held that a will "was not binding upon the tarwad of the testator

(*a*) I. L. R., XXV Madras, 662.

(*b*) Proceedings of the Sudder Court of the 25th September 1843.

because, according to the law applicable to such property, the self-acquisition of the testator, having been left undisposed of by him during his life-time, was not validly disposed of by the will which could only take effect after his death" (*a*).

In Ryrappan Nambiar *v.* Kelu Kurup, however, the same Judges held that, in a family governed by Marumakkathayam law, the self-acquired property of an individual member, though it became tarwad property at his death, still remained liable for the debts of the deceased acquirer in the hands of the members of the tarwad (*b*).

In Alami *v.* Komu and the Secretary of State for India, the High Court (Kernan and Muttusami Aiyar, JJ.) held that the last surviving member of a Malabar tarwad could make a valid testamentary disposition of the tarwad property (*c*). In Kuttyassan *v.* Mayan the question as to whether the principle laid down in Alami *v.* Komu (*c*) would apply in a case where there was heirs in the tarwad was discussed, but the Judges (Collins, C. J., and Parker, J.) found it unnecessary to decide it, as it was shown that the deed the validity of which was in dispute was not in reality a testamentary disposition, but a deed of gift which had been recognised and accepted by the tarwad (*d*).

In Achutan Nayar *v.* Cheriotti Nayar the Karnavan of a Marumakkathayam tarwad applied for a succession certificate to enable him to collect the debts due to a junior member of his tarwad who had died leaving a will by which he bequeathed his self-acquired property to two persons who opposed the application for grant of certificate to the Karnavan. The District Judge ordered the certificate to be given to the Karnavan, observing that the deceased was not the last surviving member of his tarwad and that he could not override the right of survivorship held by the Karnavan. As his self-acquired property was not

(*a*) S. A. 534 of 1878, H. C.
(*b*) I. L. R., IV Madras, 150.
(*c*) I. L. R., XII Madras, 126.
(*d*) I. L. R., XIV Madras, 495.

disposed of by him during his life-time it passed on his death to his family of which the Karnavan was the legal representative. The High Court (Collins, C. J., and Benson, J.), however, reversed this order for the following reasons:—

"In the case of tarwad property, no doubt, it is only the last surviving member of the tarwad who can validly dispose of it by will. The reason is that, in that case, there is no coparcener in existence who can succeed by survivorship, so as to exclude the operation of the will. But, in the case of self-acquisition, this rule does not hold good, for the reason on which it rests does not exist. The case of Ryrappan Nambiar *v.* Kelu Kurup (*a*) is an authority for holding that the property, in this case, does not pass by survivorship but by inheritance, and the recent decision in the Court of Wards *v.* Venkata Surya Mahipati Ramakrishna Rao (*b*) in effect rules that the powers of gift *inter vivos* and of will are co-extensive among Hindus under the Mitakshara law. We think that the same rule may be held to apply to persons governed by the Marumakkathayam law, and the Bill now before the Legislative Council recognizes the right as one that exists. In the present case the will is admitted, and it is admitted that the property is self-acquisition. No probate of the will is required, as the case does not fall under s. 1, cl. 4 of the Succession Certificate Act (*vide* Kalidas Fakirchand *v.* Bai Mahali (*c*)). This being so, effect must be given to the disposition of the will" (*d*).

The Bill alluded to in this judgment was passed as Act V of 1898 (Madras) and by it all doubts that had been previously entertained as to wills executed by members of a Nayar tarwad have been set at rest. The third and fourth sections of this Act provide that all persons domiciled in the Presidency of Madras, who are governed by the Marumakkathayam law of inheritance who are of sound mind and not minors, may by will dispose of all property which they could legally have alienated by gift *inter vivos* and shall be deemed to have always been competent so to dispose of such property (*e*).

(*a*) I. L. R., IV Madras, 150.
(*b*) I. L. R., XX Madras, 167.
(*c*) I. L. R., XVI Bombay, 712.
(*d*) I. L. R., XXII Madras, 9.
(*e*) Act V of 1898 (Madras) is printed in the Appendix.

A somewhat difficult question has been raised as to the nature of the estate acquired by a donee or devisee of property transferred by gift or will by a person governed by Marumakkathayam law. The decisions of the High Court were conflicting and consequently, when the question came before a Bench of the High Court (Best and Subramania Ayyar, JJ.) in 1892, it was referred to a Full Bench. In the order of reference the facts of the case and the decisions bearing on them are set out by Mr. Justice Best. Certain properties belonging to one Taruvai were after his death given to his first wife Ayissumma and her children, Uthotti and Kunhacha Umma, in accordance with his orally expressed wish. In execution of a decree which provided that the judgment debt should be paid out of the assets of Uthotti, deceased, the properties left by Taruvai to his first wife Ayissumma and children were attached. Before the High Court the appellant Kunhacha Umma. daughter of Ayissumma, contended that the property thus given to Ayissumma and her children was given to them as joint tenants, that they thus became with regard to this property a separate tarwad, and that the property was held by them subject to the incidents of tarwad property, and that it was consequently non-partible, and, therefore, not liable to attachment or sale in satisfaction of a decree obtained against one of the members of the tarwad. On the other hand, the respondent's Vakil referred to Narayanan *v.* Kannan (*a*) and to Parvathi *v.* Koran (*b*) as authorities justifying the dismissal of this appeal. Mr. Justice Best deals with these contentions as follows :—

" Parvathi *v.* Koran (*c*) merely follows the decision in Narayanan *v.* Kannan (*d*) and the correctness of this latter decision has been questioned in Moidin *v.* Ambu (*e*) by

(*a*) I. L. R., VII Madras, 315 (Muttusami Aiyar and Brandt, JJ.).

(*b*) S. A. No. 1066 of 1889 (Collins, C. J., and Shephard, J.).

(*c*) S. A. No. 1066 of 1889 (Collins, C. J., and Shephard, J.).

(*d*) I. L. R., VII Madras, 315 (Muttusami Aiyar and Brandt, JJ.).

(*e*) S. A. Nos. 647 and 648 of 1890 (Muttusami Aiyar and Shephard, JJ.)

Muttusami Aiyar and Shephard, JJ., who have pointed out that the decision in Narayanan *v.* Kannan (*a*) appears to be in conflict with the principle laid down in Sreemutty Soorjeemoney Dossee *v.* Denobundoo Mullick (*b*) and Mahomed Shumsool *v.* Shewukram (*c*).

"The principal reason assigned by the learned Judges who decided Narayanan *v.* Kannan (*a*) for arriving at the conclusion come to by them, namely that the right of partition is 'an incident of the estate given by Hindu law,' is inapplicable to an estate under the Marumakkathayam law, of which estates impartibility and not partibility is the legal incident.

"The case of Renaud *v* Tourangeau (*d*), also referred to in that decision, is no doubt authority for holding an absolute prohibition of alienation, to be invalid, *e.g.*, in the case dealt with in Narayanan *v.* Kannan (*a*), a prohibition of alienation by the tarwad itself, or by its Karnavan acting on behalf of the tarwad, but it seems hardly authority for the proposition that in the case of property devised, as that was, to be held under the usual custom of Malabar, a prohibition of alienation of the share of any member, except with the consent of the tarwad or by its Karnavan, is not valid against a creditor seeking to proceed against one member's interest in the joint property.

"Finally, the mere fact of the property having been such that the grantor could have dealt with it as if it had been his self-acquisition, appears to be an invalid reason for holding it to be partible after it has been devised to a definite branch of the family for the purpose of being held jointly by that branch.

"It is true that in the present case there is no express prohibition against alienation, nor is it stated in so many words that the property was to be held by the grantees as their tarwad property, but, taking into consideration what are known to be the ordinary notions and wishes of persons in Malabar in the position of Taruvai, the grantor of the property, and also the ordinary incidents of property in the same district, and also bearing in mind that other property was similarly granted at the same time to the scond wife and her children, there can

(*a*) I. L. R., VII Madras, 315 (Muttusami Aiyar and Brandt, J.J.).

(*b*) VI Moore's I. A., 526.

(*c*) L. R., II I. A., 7.

(*d*) L. R., II P. C., 4.

be no doubt, I think, that the intention was that the property should be held by the grantees as joint tenants. The four unities of a joint tenancy are all found in this case, namely of possession, of interest, of title, and of the time of commencement of such title."

The Full Bench of the High Court (Collins, C. J., Muttusami Aiyar, Parker and Wilkinson, JJ.) accepted the view of the law taken by the referring Judges and held as follows:—

"The properties in question originally belonged to one Taruvai, and they were given after his death to his wife Ayissumma and her children in accordance with his orally expressed wish. The question referred to us is whether Ayissumma and her children took the properties with the incidents of property held by a tarwad. In the case before us the donor expressed no intention as to how the properties should be held by the donees, and, in the absence of such expression, the presumption is that he intended that they should take them as properties acquired by their branch or as the exclusive properties of their own branch, with the usual incidents of tarward property in accordance with Marumakkathayam usage which governed the donees This view is in accordance with the principle laid down by the Privy Council in Sreemutty Soorjeemoney Dossee *v.* Denobundoo Mullick (*a*) and Mahomed Shumsool *v.* Shewukram (*b*). The decision in Narayanan *v.* Kannan (*c*) was not followed in Moidin *v.* Ambu (*d*), and it appears to us to be in conflict with the rule of construction indicated by the Privy Council" (*e*).

(*a*) VI Moore's I. A., 526.
(*b*) L. R., II I. A., 7.
(*c*) I. L. R., VII Madras, 315.
(*d*) S. A. Nos. 647 and 648 of 1890.
(*e*) I. L. R., XVI Madras, 201.

PART II.

LAND TENURES.

CHAPTER VIII.—INTRODUCTORY.
CHAPTER IX.—THE KANAM.
CHAPTER X.—THE OTTI.
CHAPTER XI.—KULIKANAM—COMPENSATION FOR IMPROVEMENTS.
CHAPTER XII.—COWLES.
CHAPTER XIII.—PERPETUAL LEASES.

PART II.

CHAPTER VIII.

INTRODUCTORY.

In Malabar, it may be said that every man with any pretensions to education is his own conveyancer, and what at first appears to be a complicated system of tenures may be so arranged as to be easily intelligible. The following sketch deals with all the more important forms of transfer of property.

The simplest mode of transfer is the verum-pattam or simple lease, in accordance with which, after deducting the bare cost of seed and cultivation, the whole of the estimated net produce is payable to the landlord. The tenant is in fact a labourer on subsistence wages, though it suits his landlord to bind him by a contract.

It not unfrequently happens that the rent which the tenant covenants to pay is more than the land can yield, and in this case a burden of debt accumulates round him, and his position is little better than that of a slave. If he incurs his landlord's displeasure, a decree for eviction and arrears of rent follows, and his means of livelihood are gone for ever.

This picture is the extreme. There are other verum-pattam leases in which the old custom of reserving one-third of the net produce, after

deducting the cost of seed and cultivation, for the tenant is retained and the remaining two-thirds are payable to the landlord. Here, there is a real contract between the parties, beneficial to both, which may remain in force for years. The aim of the tenant will be to convert his verum-pattam into a kanam-pattam, which will give him greater fixity of tenure, and by dint of judicious presents and subservience to his landlord, or perhaps by ministering to his landlord's want of money, he may in time effect his object (*a*).

In some simple leases, a year's rent will be paid in advance at the commencement of the tenancy and the lease will then be termed mun-pattam, tala-pattam or katta-kanam. On the determination of the lease, the advance must be refunded.

A simple tenant will have no right to compensation for improvements except under special

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(*a*) The question as to whether a verum-pattam tenant claiming under a lease from the ottidar is entitled to redeem the prior kanam arose recently in Paya Matathil Appu *v.* Kovamel Amina (I. L. R., XIX Madras, 151). The District Judge on appeal held that he had no such right. He observed that the lessee was not mentioned specifically in s. 91 of the Transfer of Property Act as belonging to the class of persons entitled to redeem and that under a lease as defined in s. 105 he was not described as taking an interest in the property, but only as having a right to possession. The High Court (Shephard and Best, JJ.), however, on second appeal, reversed this judgment and decided as follows :—" In our opinion the word interest is not necessarily confined to right of ownership, but is sufficiently large to include any minor interest, such as that of a tenant or a person having a charge. No doubt there has been no precedent for this suit in Malabar, but that circumstance is not conclusive. The general principle is laid down by Fry, L. J., in Tarn *v.* Turner (39 Ch. D., 456). "According to the general law of the land a person who claims as lessee under a mortgagor after the mortgage and has thereby derived an interest in the equity of redemption has the right to redeem." * * * * So long as the plaintiff has an interest validly entitling him to possession he is in a position to redeem."

contract. But for a dwelling-house which he erects with the express or implied consent of his landlord, he will be entitled to compensation on eviction, even though the word kudiyrup is omitted in the lease.

Next in order of superiority is the kanam, in accordance with which a sum of money or paddy is deposited with the landlord, on which the tenant is entitled to interest, which varies from three to five per cent. The rent, kanam-pattam, payable to the landlord will not be more than one half of the net produce after deducting the cost of seed and cultivation. The tenant is entitled to be left in possession undisturbed for twelve years and to be reimbursed for all unexhausted improvements when evicted.

If at the end of twelve years the tenant renews his kanam, he must pay a fine or premium which, according to ancient usage, ought not to exceed twenty to twenty-five per cent. of the kanam or one year's rental at the option of the landlord, but which in the present day is usually fixed according to the landlord's caprice. After renewal, the tenant is entitled to hold the land for another term of twelve years.

If, during the term of a kanam, a further sum of money is advanced by the tenant, it is termed a puramkadam and he is entitled to deduct from the rent the interest on money so advanced. If the tenant is not prepared to make the advance, the landlord will have recourse to a stranger in whose favour he will execute a melkanam. The mel-

kanam holder will be entitled to redeem the kanam holder at the expiry of his term (*a*).

Akin to the kanam is the panayam or simple mortgage with or without possession. The terms of a panayam may be similar to those of a kanam, but there are no implied covenants for quiet enjoyment for twelve years nor for compensation for improvements. One form of panayam is called the undaruthi-panayam, because it extinguishes itself. Within a term fixed by the parties, both principal and interest will be extinguished by the usufruct and the land will revert free of encumbrance to the mortgagor.

(*a*) The question as to whether the grantor of a kanam to whom the grantee has made a further advance is entitled to pay off such additional advance without waiting for the expiry of twelve years from the date of the original kanam was considered by the High Court (Subramania Ayyar, Boddam, Moore, O'Farrell and Michell, JJ.) in Kunhi Amma *v.* Ahmed Haji. The kanam was dated the 21st March 1868 while the puramkadam document was drawn up on the 1st November 1870. This latter deed ran as follows :—"This amount of Rs. fifty, together with the customary interest thereon, will be added to the kanam amount when after the expiry of the period of demise of the said paramba a renewal is effected or the paramba is caused to be surrendered." Moore, J., was of opinion that under the terms of the document the puramkadam could not be paid off before the date on which the tenure under the kanam could be terminated but the other Judges were of opinion that the terms of the document did not contain any clear expression of such intention. O'Farrell, J., also expressed the opinion that not only could the puramkadam amount be paid off at any time but that there was nothing in the customary law of Malabar to prevent repayment of the kanam amount before the expiry of the period of twelve years while Michell, J., held that it had not been shown that any custom existed precluding repayment by the mortgagor of the amount of the puramkadam at any time before the expiration of the period of the kanam (I. L. R., XXIII Madras, 105).

With all due deference to these learned Judges I must express a doubt as to whether it can be laid down that according to the customary law of Malabar the grantor of a kanam can at any time after granting the kanam force the mortgagee to receive the kanam amount or that where a further advance has been made he can compel the mortgagee to receive the amount of the puramkadam before the date on which the original kanam tenure expires. Such cases are, however, not likely to come often before Courts and I am not aware of any express decisions on these questions.

The kuli kanam or reclaiming lease for planting differs only from the kanam in that no advance is made to the landlord. The tenant has a right to quiet enjoyment for twelve years, and to compensation for improvements.

The next form of transfer is the otti, veppu or palisa madakkam which is a usufructuary mortgage, the interest on which almost, if not quite, extinguishes the usufruct, and in which nothing but a pepper-corn rent is reserved to the mortgagor. The mortgagee has all the rights of a kanam tenant, and in addition has the right of pre-emption if the landlord wishes to part with his freehold.

Akin to the otti is the peruvartham, under which form of mortgage the land is mortgaged for its full market value, and can only be redeemed on payment of the full market value at the time of redemption. The tenant has the benefit of any rise in the value of land.

The last form of transfer to which the other three already mentioned successively lead are known as attiper, nirmudal, janmam panayam and kudimanir. By the execution of any one of these deeds the owner parts with everything except a nominal interest in the land.

In addition to the modes of transfer already noticed, grants of land are frequently made either for a consideration or as a reward for services rendered in the form of perpetual leases. The grant, if made to a Brahman, is termed santathi Brahmasvam, if made to a non-Brahman, of caste equal to or higher than the grantor, it is called anubha-

vam or sasvitam, and if some nominal rent or right to renewal fee is reserved, karankari or janmam koru. If made to a person of inferior caste, it is known as adima or kudima. Grants of temple land on service tenure, *i.e.*, on condition of performing future services, are termed karaima. Grants under any of these forms are said to be resumable by the grantor on failure of heirs in the family of the grantee. Deeds of gift except for religious uses are exceedingly rare.

The mode of fixing the pattam or landlord's share is as follows:—

	Paras
A land is said to sow 15 paras of seed. Its estimated yield is seven-fold or	105
Deduct for seed 15 paras and for cultivation 15 paras	30
And the balance or maximum verum-pattam is ...	75
The minimum verum-pattam would be... ...	50
The kanam-pattam would be	$37\frac{1}{2}$
Interest at 5 per cent. on a kanam of Rs. 100 would be Rs. 5 equivalent to	15
And the net rent payable would be	$22\frac{1}{2}$
Interest at 5 per cent. on an otti of Rs. 250 would be Rs. $12\frac{1}{2}$ or	$37\frac{1}{2}$

And the interest would exactly extinguish the usufruct.

The saleable value of such land would probably be about 12 years' purchase of the net yield, *i e.*, $75 \times 12 = 900$ paras or Rs. 300.

Those interested in the various tenures alluded to in this chapter should refer to Sir Charles Turner's minute on Malabar Land Tenures, Chapter III (*a*). Many of the forms of tenure mentioned in this chapter are now interesting, from a historical point of view only. Attiper or nirmudal deeds, for example, are very rarely met with.

(*a*) Minute on the Draft Bill relating to Malabar Land Tenures by Sir C. Turner, Chief Justice, Madras (1885).

CHAPTER IX.

THE KANAM.

In accordance with modern decisions, a kanam may be defined as a usufructuary mortgage of immoveable property for the term of twelve years (unless some other terms is specified) by the conditions of which a definite share of the estimated produce is reserved for the mortgagee as interest on the money advanced and for payment of the Government revenue and the balance is payable in the shape of rent to the mortgagor.

It has always been a matter of controversy whether a kanam should be treated as a lease or a mortgage. The true view to take probably is that it partakes of the nature of both (*a*). The point was in 1880 referred to a Full Bench consisting of Turner, C. J., and Innes, Kernan, Kindersley and Muttusami Aiyar, JJ., but it became unnecessary to decide it The judgment of Innes, J., in which the other Judges concurred, contains the following observations :—

"If it were necessary to consider the point referred to the Full Bench, I should hold that for purposes of Limitation, the object for which the tenure was created must be regarded. In some cases it may be a mere lease, a sum being advanced as security for rent or for proper cultivation to be repaid on the expiry of the term. In other cases, and most frequently, it is created as a lease by way of mortgage to secure a loan advanced to the janmi Rent is payable in the case of every kanam but all kanams partake also to a certain extent of the

(*a*) The High Court has recently held that for the purposes of the Stamp Act a kanam should be treated as a mortgage, and not as a lease or as both a mortgage and a lease, under Sec. 6, Act II of 1899 (opinions in Referred Cases 1 and 13 of 1903, dated 16th October 1903).

incidents of a usufructuary mortgage. The mortgagee in all such holdings is assumed to be able to derive from the lands placed in his possession enough to pay the interest at least of the money advanced. The discharge of the principal is not immediately contemplated. The holder of the kanam therefore pays himself the interest and also pays the Government tax either directly or through the landlord. The overplus or a certain fixed amount in grain or money is paid to the landlord. If, when viewed scientifically, it cannot be wholly regarded as a mortgage, it certainly cannot be wholly regarded as a lease, as undoubtedly the land enures as security, if not for the principal, at least for the interest of the loan advanced. The Limitation Act has no provision specially applicable to tenures of a mixed character and in most cases it would be obviously improper to apply to such tenures the provisions of Article 118 of the Second Schedule of Act IX of 1871 (the Act by which this case is governed) and assign to it a limitation of only six years. For the purposes of limitation when, as is alleged in the case before us, it is intended as a mortgage, we must apply to it the Law of Limitation applicable to mortgages" (*a*).

In commenting on this decision Mr. Wigram expressed the opinion that it was now too late to apply the test proposed. For more than thirty years the kanam had been judicially treated as a usufructuary mortgage. The people had acted on the opinion expressed by the Courts and ought not now to be prejudiced. The High Court did not, he considered, seem to have fully appreciated the difficulty of holding that the legal incidents of a kanam should vary according to its terms.

The truth, in Mr. Wigram's opinion, probably was that in North Malabar the kanam was really a usufructuary mortgage in its inception (*b*). The transaction was one

(*a*) Nellaya Variyath Silapani *v.* Vadakipat Manakel Ashtamurti Nambudri, I. L. R., III Madras, 382.

(*b*) As to this Sir Charles Turner says in his minute on Malabar Land Tenures. "I do not agree with this statement as to the origin of the kanam but, I cannot controvert Mr. Wigram's statement as to the existing kanams."—Minute, p 164.

between borrower and lender and the land was security for the loan. It was not usual to grant renewals or exact renewal fees. The rent reserved was a mere nominal sum just sufficient to show that the janmi had not parted with his seigniorial rights and the tenant was not entitled to improvements unless he had the express authority of the janmi to effect improvements. On the other hand, in South Malabar, the kanam was originally known by the name of ubhayapattam (land lease). The money advanced was simply a security for the punctual payment of rent and husbandlike cultivation. The rent reserved was a substantial sum and the tenant had implied authority to effect improvements. From time to time, a renewal fee was exacted by the landlord which the tenant could only evade by surrendering his holding.

In the early reports on Malabar Tenures, the distinction between the kanam in North Malabar and the kanam in South Malabar was not sufficiently appreciated, and hence arose confusion of ideas which finally resulted in all kanams being treated as mortgages. A native Judge of large experience expressed to Mr. Wigram his opinion that in South Malabar we ought to revert to ancient usage and treat the kanam as a lease for twelve years and that the usage and customs of North and South Malabar in reality differ as widely from one another as the land laws of England and Ireland. Mr. Wigram, however, considered that it was now too late to revive the ancient practice and that whatever harm had been done by official misunderstandings had been done already and could not be undone.

The whole subject will be considered under the following heads:—

(1) Early history of the kanam.
(2) Allusions in official reports.
(3) Absence of judicial decisions up to 1851.
(4) Mr. Strange as Commissioner.
(5) Early judicial decisions.

(6) What constitutes forfeiture.
(7) Essentials of the contract.
(8) Rights of mortgagor.
(9) Rights of mortgagee.
(10) Miscellaneous.

and an attempt will be made to show how the legal relation of janmi and kanamkaran has been gradually evolved by the Courts from general principles of equity.

(1) Early history of the Kanam.

The key-note to the proper understanding of the Land Tenures of Malabar was in Mr. Wigram's opinion the meaning of the three words pattam, kanam and janmam. Mr. Logan had, he considered, hit upon the proper definition of the word pattam which he had defined as the pativaram or pad's share of the produce. Pad is an honorific affix, as in Nambudripad, Tirumulpad, Karnavanpad and Tarapad or tarwad, and was probably applied to the Brahman or the Nayar family who had acquired a title by occupation. When a family had acquired more land than they could cultivate by their agrestic slaves, some of the lands were entrusted to persons of inferior class who, retaining one-third of the produce for themselves, paid over two-thirds, or the pad's share, to the overlord.

Kanam originally meant simply possession and was, Mr. Wigram was inclined to think, applied only to the possession of the tarwads who were under certain restrictions as to alienation. The superior class of landowners such as the Devasam, the Brahman and the King's family (Kovilagam) were under no restrictions whatever and might alienate the land by gift or sale. The form of transfer was termed attiperu or nir-attiperu, lit., that which is obtained completely or perhaps that which is obtained by contract with water. The nir mudal, which Mr. Wigram, from the information available to him, defined as "property in the water", was the last right with which the proprietor parted.

The word janmam meant birthright and, in Mr. Wigram's opinion, came into use in connection with the word kanam. In the first edition of this work he observed as follows :—

"In former times, the tarwads held their lands free of all taxes, but they were under an obligation to render personal military service. In process of time, the tarwads found themselves too weak to resist the exactions of the Rajahs and Chieftains and for their own protection placed themselves in feudal relation with some superior lord who became the janmi. The arrangements entered into between the janmi and kanamkaran probably varied. In some cases a third of the produce was assigned to the janmi and two-thirds were the kanamkaran's property. The kanam-pattam represented the one-third paid by one who had a right of occupancy, as the pad's share and was opposed to the verum-pattam or two-thirds paid by one who had no such right of occupancy. In other cases, a fine or premium was paid to the janmi as the price of his protection. It is easy to see how this developed into the system which we found in force in 1792 A.D. Where the Rajah or Nadvari waxed strong and the tarwad weak, the position of the latter was simply that of lessee or mortgagee. Where the tarwad waxed strong, it took the earliest opportunity of repudiating the claim of the Rajah or Nadvari and asserting its own independence. If full justice had been done at the time of the first British settlement of Malabar, it would have been necessary to distinguish between the hereditary Nayar kanamkaran whose military services were dispensed with and who ought to have been treated either as full owner or at least as having a permanent right of occupancy and the comparatively recent kanamkaran (Mappilla or Tiyan or perhaps Nayar) who had no rights in the land except such as he derived from the janmi. But all were treated alike as lessees or mortgagees. Probably, there was a large class who had been originally pattamkarans and had been converted into kanamkarans and practically held the position of tenants having a permanent right of occupancy, subject to a payment of a fine at stated intervals and to rendering the usual homage at the time of Onam and Vishu to the janmi. Or again, the kanamkaran might have ministered to the wants of his janmi and supplied him with funds for the perform-

ance of some marriage ceremony or the purchase of fresh landed estate. This placed him in a still firmer position as he was entitled to interest on the money which he had advanced as a charge on the land."

The first edition of this work was published and the opinion just quoted was formed by Mr. Wigram after a perusal of certain papers that had been drawn up by Mr. Logan, who had been for many years Collector of the District, relating to Malabar land tenures. The Manual of the Malabar District was published by Mr. Logan in 1887. In this work Mr. Logan has set forth at considerable length his views as to the land tenures of the district which were to a very considerable extent based on what he was of opinion was the derivation of certain important words and phrases. The late Mr. Arthur Thompson, I.C.S., who was then Sub-Collector of Malabar, examined these derivations and the deductions drawn from them in a note which has been published in the Malabar Law Reports.

The words discussed by him are kanam, pattam and nirattiperu and the following is his criticism of Mr. Logan's views :—

"Kanam is derived by Mr. Logan from the root kanu to see and he states that its proper meaning is "seeing," or "supervision," and that the primary meaning of the derivative term "kanakkaran" is therefore "supervisor" or "protector." Mr. Logan then proceeds to identify the kanakkarans or protectors with the Nayar caste ; a further step is to identify the Nayars with the "six hundred" mentioned in a deed printed in the appendix to his work, as is done further on (*a*). The result is the system described on the same page under which the Nayars "were spread over the whole face of the country, protecting all rights, suffering none to fall into disuse and at the same time supervising the cultivation of the land."

(*a*) Malabar Manual, Vol. I., pp. 601, 602. The deed referred to is Deed No. 3, Appendix XII., Malabar Manual, Vol. II., p. 118.

The picture thus drawn is no doubt a very charming one, but in historical subjects no amount of beauty will compensate for want of correctness, and I venture to think that every one of the steps by which Mr. Logan is led to the conclusion given above is, to say the least, not proved.

The first step consists of the statement that the primary meaning of kanam is "supervision." It is of course quite possible that the word may have had this meaning, but to the assertion that, in point of fact, it did have this meaning, there is this insuperable answer that no instance can be found in which the word is in fact used in the sense of "supervision." Dr. Gundert's Malayalam dictionary, a work of unquestioned authority, makes no mention of the use of the word kanam in this sense.

Mr. Logan states however, that there can be little doubt that the word kanam is used in the sense of "supervision," in another deed printed by him (*a*). Mr. Logan's own translation of the passage is, however, sufficient to show that kanam cannot in this place mean supervision and that it must mean property. His translation is as follows:— "The purchase of this domain of the Padarar has then been made by the Ruler of Chernadu and the image of the god of the Padarar has been subjected to the six hundred and is kanam held under the king." If the English word supervision be here substituted for the vernacular kanam, the last sentence would become uninteligible. The translation of kanam as property at once produces a clear sense, "the image is property held under the king." If this reasoning be correct, it would therefore appear that in the only instance quoted by Mr. Logan to show that kanam means "supervision" (and on this supposed meaning his entire theory is based) an examination of the passage quoted shows that this translation is not only not a necessary one, but in point of fact an impossible one, as yielding no intelligible meaning.

(*a*) Malabar Manual, Vol. I., p. 601. The deed referred to is Deed No. 4, Appendix XII., Malabar Manual, Vol. II., p. 122.

Mr. Logan's derivation of the noun kanam from the root kanu is certainly correct, but, as stated by Dr. Gundert, it is derived from this root, not as meaning "to see" but as meaning "to appear," and its primary meaning is that which appears or is visible, hence (visible) wealth or property. It would thus appear that the idylic picture drawn by Mr. Logan of the ancient state of things in Malabar, when the Nayars were the kanakkarans, that is the supervisors and protectors of the various classes of the people, rests on nothing better than a baseless derivation.

Of Mr. Logan's identification of the kanakkarans with the Nayars and of the Nayars with the "six hundred" referred to in the deed above quoted, it is enough to say that it seems to be a mere hypothesis, without, so far as I can see, a single fact to support it.

The next term calling for remark is pattam which certainly means "rent." Mr. Logan derives this term from padu varam and says that its true meaning is therefore the share of the produce (varam) payable to the ruling power (padu). There can be little hesitation in saying that this derivation is simply impossible, no rule of the Dravidian languages and no analagous formation can be cited in support of it. The probable derivation of the noun pattam is that it is formed from the root padu by the same rule by which the root kudu (to be collected) forms the noun kuttam, and the root adu to play forms the noun attam. Would Mr. Logan derive kuttam from kudu varam, or attam from adu varam?

The next phrase to be examined is "nirattiperu." Mr. Logan repeatedly translates this as "water-contact birthright" and from this translation he draws the conclusion that "nirattiperu" is the ancient equivalent of the modern janmam, one of the meanings of the Dravidian root peru being "to bring forth," while the meaning of the Sanskrit root "jan" is "to be born."

This translation seems to be open to the following objections :—

Firstly: the translation in question has no easily intelligible meaning.

Secondly ; so far as it can be made to yield an intelligible meaning, such meaning is self-contradictory, as the right, if a birthright, that is, one derived from birth, cannot also be derived from contact with water.

Thirdly ; the translation interpolates the word " right " for which there is no warrant in the original.

Fourthly ; the translation assumes the use of the term " peru " in an impossible sense. Peru is a noun derived from the root " peru " which means, *inter alia*, to bring forth ; the noun therefore means *inter alia* " bringing forth " in the active sense ; it does not and cannot signify " birth " or " the fact of being born " which is the sense assumed in the phrase " water-contact birthright."

What then is the correct translation of " nirattiperu,' supposing that the above four reasons are sufficient for the rejection of " water-contact birthright ? "

As the root peru besides meaning " to bring forth " has also the still more common meaning of " to obtain," so the derivative noun peru, besides meaning the act of bringing forth, also means the act of obtaining. I can hardly think that any one who considered the translation of the phrase nirattiperu simply as a question of philology without being biased by any theory of land tenure, could hesitate in translating it as " acquisition by contact with water," that is, " complete acquisition," a gift or transfer by pouring out water being in former times in India regarded as a complete and irrevocable one, the idea being that the interest of the donor in the property passed away as completely and as irrevocably as the water sank into the ground to appear no more. This translation appears to be free from all the objections above urged to the

"water-contact birthright" translation, inasmuch as it is unmistakeably clear and not self-contradictory and is in accordance with the meaning of the separate vernacular terms and does not require the interpolation of any word, such as "right," which is not to be found in the original phrase.

If, however, my translation is correct and the phrase "nirattiperu" contains no reference to "birth," the connection between it and janmam at once disappears, and therewith must disappear the deductions drawn by Mr. Logan from this supposed connection.

It should, however, be pointed out that Mr. Logan in a foot-note in the second volume of the Manual says that the close connection between the Dravidian peru and the Sanscritised form of it, janmam is sufficiently obvious from the use in the deed there printed of the phrase "perum (literally "born" or "produced") attiperartham" (*a*). These words he correctly translates as the market "Attiper value." The root "peru" as used in this connection has, however, nothing at all to do with "being born," and it would be impossible to explain the phrase "perumartham," "market value" on the assumption that the root peru was used in it in the sense of "being born." Peru is here used in the sense of "to obtain," and by the common idiomatic use of the indefinite relative principal, perumartham means the price (artham) which any person could ordinarily obtain (perum), hence the market value.

Mr. Logan on the basis of his explanation of kanam as supervision, of pattam as the share (varam) paid to the ruling authority (padu), and of nirattiperu as corresponding in origin and in meaning, with the term janmam, has built up a theory of the ancient state of things in Malabar, according to which the only rent, pattam,

(*a*) Malabar Manual, Vol. II., p. 151, foot-note. The deed referred to is Deed No. 44, Appendix XII., Malabar Manual, Vol. II., p. 151.

was that paid to the State or Ruling power and the kanam right of the kanamdars was merely the right to be remunerated by the actual cultivators for the kanam or supervision exercised by them in behalf of the cultivators, so that the real owners of the soil were the cultivators, subject only to the payment of rent to the ruling power, and of the supervisor's share to the protecting and supervising class (*a*). If, however, it be considered that sufficient reason has been shown for questioning the correctness of the derivations, which form the basement on which the theory is built, the superstructure also must come to the ground.

The question may, however, be fairly asked; if Mr. Logan's theory is to be rejected, how is the existence of the present kanam system of tenure in Malabar to be accounted for?

The term kanam means visible or property and is specially applied to the property or interest in land that a mortgagee obtains by advancing money to a landowner, the interest so acquired in the land depending in direct ratio on the amount of money advanced. This mortgage system is not confined to Malabar; it is probably the commonest form of sub-tenure in the districts on the east coast also. Where an English landlord would borrow money on the security of his land, the land being retained in the hands of the brrower, the Indian custom is for the borrower to transfer the land to the creditor, who pays himself the interest out of the profits obtainable in a fixed number of years. Sometimes the profits are so great that the creditor is able to repay himself the principal as well the interest, in which case the mortgage is known in Malabar, not as kanam, but as "undaruthi." Sometimes again the mortgage is a perpetual one, in which case it is termed "Kudima janmam." Examples of all these mortgages could easily be found on the east coast. All that is really peculiar to Malabar is the ter-

(*a*) Malabar Manual, Vol. I., p. 272, foot-note.

minology, kanam, otti, undaruthi, etc., etc., by which the various forms of mortgages are known.

So, again, in the case of janmam, there are two things to be considered, firstly the word, which is peculiar to Malabar, and, secondly, the thing thereby denoted, which, in my opinion, is far from peculiar to Malabar.

The term janmam is of course a pure Sanscrit word meaning "birth" and the difficulty is to account for the general use of this Sanscrit term in Malabar in the totally different sense of "the proprietary interest of the landlord in land." I would hazard with much diffidence the conjecture that janmam and janmakaran or janmi were adopted simply as the nearest approach in Sanscrit to the Musalman terms jamin and jamindar. This conjecture receives some support from two facts; first that the earliest instance as yet found, of the peculiar Malayalam use of the word is in A.D. 1681, when the Muhammadans had established a paramount influence all over India, and second that of all Dravidian languages. Malayalam most freely uses Sanscrit terms in an unaltered form and very often with a complete change of meaning.

Whether janmakaran and janmi be thus historically connected with jamindar or not, it is certain that they are in meaning nearly identical with it, the only difference being due to the difference of the system by which the British Government collects its land revenue. In a jamindari district, Government collects its revenue from the jamindar, ignoring the cultivating tenant. In Malabar, Government collects its revenue from the cultivating tenant, ignoring the janmakaran, janmi or jamindar. Introduce the Malabar system into Ganjam and the jamindar becomes a janmi. Introduce the Ganjam system into Malabar and the janmi becomes a jamindar. There is no real difference between the two.

Mr. Logan accounts for the fact that, prior to the Mysorean invasion, there was no regular public land

revenue in Malabar, by the theory that on extinction of the supreme "Kon" or King in the ninth century, the share of produce due to him passed to the Nayars or "six hundred" (*a*). No facts are adduced in support of this theory, and it seems to me to be much more probable that the real cause of the apparent absence of land revenue was that such revenue was practically collected in the form of transit and export dues" (*b*).

The above criticism has been quoted in full as it is generally held to be in the main sound. All Mr. Logan's observations as to the kanam and other allied tenures, to be found in his reports as Special Commissioner and in his Malabar Manual, must be read in the light of this criticism.

(2) Allusions in official reports.

In his report on the land tenures of Malabar, 1801, which is to this day the standard work on the subject, Major Walker treats of the kanam as a lease. He writes :—

"The usual period of a lease is limited from three to six years. The paramba, if the parties think necessary, undergoes a new inspection, as the produce may have increased or diminished. The pattam is fixed on renewing the karanam (deed). On the renewal of his lease the pattamkaran (tenant) makes an advance of half the pattam to the janmakaran (landlord). Although this is the customary period for leasing lands, if it is agreeable to the parties, the number of years may be extended or reduced at their pleasure, but a lease in every case must expire with the life of the janmakaran. It must be renewed by the heir. The pattamkaran must pay an entire year's pattam and suffer a deduction or make an addition of thirteen fanams per cent. on the kanam money. The karanam will be then executed according to the original equivalent or kanam. The deed must also be renewed on the death of the pattamkaran liable to the above burthens to his family, should the janmakaran be disposed to continue the lease to them ; but this is at his option, as he may on its expiration in

(*a*) Manual of Malabar, Vol. I., p. 602.

(*b*) Malabar Law Reports, Vol. I., pp. 77—83.

any manner dispose of the paramba as shall be most agreeable to himself."

Certain minor differences when the Rajah is the lessor are then pointed out and Major Walker proceeds :—

"In case the janmakaran changes his pattamkaran, or demands his paramba back from his kudian (tenant), he must repay the original kanam with the interest and also kulikanam or a sum of money equal to the expense or value of the improvements introduced by the tenant. But should the kudian have neglected the estate and the produce by that means is diminished, the loss will be made good to the janmakaran from the kanam. On either of these events, people are assembled to ascertain the amount due to the parties."

In an extract from the General Report of the Board of Revenue, dated the 31st January 1803, the kanam-pattam is thus described :—

"Kanam-pattam or tenure by mortgage. Here a sum of money is given by the mortgagee to the mortgagor for the occupancy of the land made over to him. If the produce exceed the interest of the sum lent, the kanamkaran (mortgagee) pays the overplus to the mortgagor and *vice versâ.* The mortgagor generally neglects to pay the overplus until it accumulates to an amount which precludes redemption though this is always in his option. Hence the kanamkaran does not improve the land with the same confidence as if it were his unalienable property."

Again in a Report of the Collector, Mr. Thackeray, dated the 4th August 1807, the kanam-pattam is thus defined :—

"Kanam-pattam is when the landlord lets his land receiving a sum in advance from his lessee which may be considered either as a loan or as security for the due payment of the rent. The tenant retains so much of the rent as will discharge his claim for interest and pays the remainder to the proprietor."

In his Report of the 13th September 1815, Mr. Warden, Collector of Malabar, treats the kanamkaran simply as a mortgagee who, after he has entered into possession, is invested with every right of proprietorship, except that

of alienating the land by sale. He then proceeds to describe the system of renewals thus :—

"It was a prerogative inherent in the janmam right that the kanamkaran should renew his kanam deed after the lapse of a certain number of years. The renewal entitled the janmakaran to a remission of a fixed percentage on his original debt. By such periodical renewals and concomitant deductions the land in process of time became disencumbered of its kanam and the lease naturally fell in, unless the person in succession may have been satisfied with levying a fee in money instead of granting a renewed lease with a reduced kanam. I have never seen a bond in which the time for renewing it was specified or the least allusion made to that privilege. It seems to be sufficiently well understood as an established custom of the country and formed the great prerogative of the janmakaran which gave to him and his heirs a never ceasing interest in the janmam. It always enabled them to borrow money and in the course of time the land reverted to the family as it were in a regenerated form."

* * * *

"Among the Rajahs, the practice was to require their tenants to renew their deeds at the accession to the Raj of every new head. In the Cochin territory, such renewals have occurred three times in the last seven years and must have been severely felt if strictly enforced."

"In Major Walker's treatise it is noticed that a lease in every case must expire with the life of the janmakaran and that it must be renewed by the heir. There is an exception, however, to the rule, according to my information, which provides for the old lease running a specific duration of time before the heir can obtain a renewal. The justness of it argues in its favour to prevent the hardships a kanamkaran would be liable to by a rapid succession of lapses in his janmakaran, for the deduction that takes place at all renewals is thirteen per cent. of the kanam besides the payment of an entire year's rent to the janmakaran. In case the kudian should of his own accord be desirous to return the paramba to the janmakaran, he must sustain a deduction of twenty per cent. on the sum in deposit. This is called a sakshi (lit., a witness) or a

fee for liberty to return an estate the benefits of which he has been some time in enjoyment of."

"The janmakaran may revoke a lease before it expires at any period, excepting at the season of produce, on paying the pattamkaran his kanam, the expense of executing the karanam and double the value of kulikanam."

In his Report on the District of Malabar for 1822, Mr. Græme writes:—

"It seems to have been considered that lands were expressly and for the first time made over to the mortgagees to discharge an existing debt contracted from causes unconnected with the occupation of the land, but the fact is, I believe, that the money was almost invariably borrowed from tenants who were previously in possession. The origin of these loans seems to have been that the tenant should give a year's rent in advance to the proprietor either as a necessary security for payment or as a bonus for the profit he was allowed to enjoy, and the extravagance or necessities of the proprietors induced them to continue to brorow till the rights and interests of the mortgagee in the land became stronger than those of the proprietor."

And again, after describing the usual terms of the deed, he says:—

"Though not specified in the deed, it was formerly customary to give from three to five per cent. on the amount of the principal to the proprietor upon making out this deed, as a fee under the name of oppu or signature and further the mortgagee had to give two per cent. under the denomination of tusi or the point of the iron style used for writing the deed. But these payments have been for some time discontinued in practice in most places: they have only reference to a state of things in which the interest of the mortgage debt bore little or no proportion to the annual rent yielded by the land in the possession of the mortgagee, and are too excessive to be applicable to the altered circumstance of the interest of the debts being equal to the pattam receivable by the mortgagee. With respect to this deed, it is understood that if

the mortgagee insists upon payment of the mortgage debt, the mortgagor has a right to deduct from the principal from ten to twenty per cent., the rate depending upon local custom under the name of sakshi and he is under no obligation to return the fees of oppu and tusi which he has received."

"If the mortgagor refuses payment upon demand, the mortgagee has a right to withhold the whole of the pattam yielded by the land in his possession until his claim is satisfied, or he may mortgage the land or sell his interest in it to another. He has no claim upon any other but the particular property mortgaged belonging to the mortgagor or any right of causing the arrest of the person of the mortgagor. If the mortgagor of his own accord tender payment of the mortgage debt, contrary to the wish of the mortgagee, he must pay the full amount without deduction for sakshi and, if the mortgagee has not held possession for three years, the mortgagor must return to him the oppu and tusi fees which he has received."

"If the mortgagee under this deed fails to pay the proprietor purappad or residue after deducting the mortgage interest from the pattam, he forfeits all claim to the debt and the proprietor has a right to demand restitution of the land."

"The policheluttu (renewal fee) payable under this deed seems intended as an equivalent for the tenant's profit, named cherulabham, which he has derived from the land. On the demise of the tenant, it is a fine of entry to his successor. The amount of it and the frequency of its renewal seem to depend upon the quality of the soil and the quantity of cherulabham which has been enjoyed by the tenant. The latter is generally ascertained by the competition of neighbours who offer better terms to the proprietor."

"In the northern division, the practice of shilakasu, or taking one year's pattam once in three or four years or a quarter or a third of the pattam every year as an equivalent of the cherulabham, has prevailed in lieu of policheluttu."

After pointing out that when the deed relates to plantations and not to rice land the tenant has a further right to kulikanam or the fixed value of the trees and the expense

of preparing the garden in conformity with the custom of the village, Mr. Græme proceeds :—

"In the deeds as well for rice as garden lands, the proprietor of the land has a right of policheluttu, that is to renew the deeds every twelve years or, when the janmakaran dies, his successor may demand the policheluttu (tearing up of old bonds and the making of new) by which he is entitled to a deduction of sakshi and oppu and tusi from the mortgage debt or to receive the amount of it in hand from the mortgagee. It is understood that the proprietor has not the right of renewal within five or six years after the last renewal."

Here we have the origin of the twelve years' term which was introduced by the Courts in favour of the tenant. In other words, the tenant's right, now recognised by the Courts, is based on the custom that the landlord might claim renewal fees at the end of twelve years.

(3) Absence of judicial decisions from 1800 to 1853.

The absence of any decisions in the Courts in suits between janmakarans and kanamkarans for the first sixty years of the British occupation of Malabar may be accounted for in one of two ways. Either the evicted kanamkaran was afraid to oppose his janmakaran, or he had acquired a quasi-permanent right of occupancy. Possibly both influences were at work in different parts of the district.

The position of the kanam tenant in Malabar, until Mr. Strange and the Courts interfered in his behalf, was an anomalous one. In law he was little more than a tenant at will and liable to capricious eviction but in practice, so long as he kept on good terms with his landlord, he had a permanent right of occupancy.

The British occupation of Malabar was injurious to the friendly relations which had hitherto existed between landlord and tenant. In the first place, the British Government required a fixed land revenue and this was foreign to the customs of the people. It had been intro-

duced by Tippu, but was always regarded as a tyrannical impost. Anxious to do no injustice to the cultivator, the Government made a liberal estimate that the cultivator was entitled to one-third of the net produce and the janmi to two-thirds and decided to claim as revenue three-fifths of the janmi's share. This was fair enough in principle, but in practice it was the cultivator, not the janmi, who suffered. It was hardly likely that, if a land yielded a net income of seventy-five paras, the janmi would allow the tenant twenty-five paras and the Government thirty and be content with twenty for himself. He would, in some mode or other, secure for himself a goodly proportion of the cultivator's share by forcing terms on the cultivator which, though ruinous, he was bound to accept or give up his land to others.

In the second place, the result of the British occupation of Malabar was to let loose a number of Nayars and others who had hitherto followed arms as a profession and who had to fall back on agriculture as a means of subsistence. As competition for the best lands increased, as the former hold of the janmis on their dependants relaxed, as the lower castes began to learn that they too had rights as citizens, agrarian discontent sprung up and there was but a short step from agrarian discontent to agrarian outrage. It was but natural that, with the class feeling which already existed between the Hindu and the Mappilla, each should endeavour to assert his own rights and it is the opinion of many competent to form an opinion, that the origin of the Mappilla outrages was more than anything else a restless feeling engendered by tyranny on the part of the landlords.

(4) Mr. Strange as Commissioner.

In February, 1852, Mr. Strange, then a Judge of the Sudder Court of Madras, whose experience of Malabar extended over more than twenty years, was deputed as a Special Commissioner to enquire into the causes of the

Mappilla outrages. His report is dated the 25th September, 1852. On the part of the Mappillas exactions by Hindu landlords had been assigned as one of the chief causes of the outrages, but Mr. Strange recorded his opinion that, though instances might and indeed did arise of individual hardship to a tenant, the general character of the dealings of the Hindu landlords towards their tenantry, whether Mappilla or Hindu, was mild, equitable and forbearing.

This is an opinion which, I am afraid, no one at the present day would hazard. Speaking of the renewals of leases, Mr. Strange says :—

"The renewals should not be oftener than once in twelve years and the complaint is that they are resorted to at much shorter intervals. From the enquiries I have made, I do not believe that grounds exist for this complaint to any serious extent."

Mr. Strange writes of the land tenures of Malabar as follows :—

"It is obviously highly essential that the tenant should not be disturbed from possession arbitrarily and at unduly short periods, and the recognized rule is that, if he should have paid a fine for his lease, it should endure for twelve years under certain reservations, as when the landlord, if a Rajah dies, when he should renew with his successor, or when the landlord requires more money on the land and the tenant will not provide it and it is obtainable from another, or when rents are not paid."

In commenting on this paragraph Mr. Conolly, the Collector, who also had had a long experience of Malabar, agreed with Mr. Strange that, according to the spirit and intention of the old laws, twelve years was the proper duration for a lease and the Sudder Court, in affirming the same view in their Proceedings of 13th February 1854, say :—

"In all cases in which tenants on taking leases of rice lands may have paid a fine to the landlord, the title which this gives the tenant to a definite term for his lease should be invariably upheld, notwithstanding that such terms may not have been

expressed in the lease, and as regards paramba lands, the tenant's right to occupancy for a term of years should be respected whenever such right obtains."

Mr. Strange must be looked on as the author of the twelve years' term. It had before this been customary to levy a fine or premium at intervals of twelve years, but it had also been customary to evict unsatisfactory tenants at any time. The new rule was a compromise between a recognition of the tenant's permanent right of occupancy and of the proprietary right of the landlord.

How eagerly the Courts adopted Mr. Strange's rule, and how it soon came to be regarded as part of the customary law of Malabar will now be shown.

(5) Early Judicial Decisions.

The twelve years' term was not regarded as part of the common law of Malabar up to 1853.

In Chatoo Nayar *v.* Ashany Chunden the Civil Judge of Calicut, whilst finding that there were precedents for securing twelve years' possession to a tenant from the renewal of his mortgage deed, held that they did not apply when the tenant was in arrears with his rent (*a*).

The next case was decided by Mr. Cook, as Sub-Judge of Calicut in 1853. The plaintiff was a purchaser of the janmam right and sued to redeem a kanam demise granted in 1850. The defendant pleaded that, while he conducted himself in conformity with the janmam and kanam rules, there was no reason for him to restore the paramba within twelve years. The Munsif held that it was contrary to the custom of the country to call upon him to restore the paramba so soon after the renewal of the last deed. On appeal Mr. Cook upheld the Munsif's decree remarking :—

"The Court will never countenance capricious ejectment,

(*a*) A. S. 169 of 1851 (Calicut). (Printed selections from the records of the Madras Government, No. 49, p. 1.)

while at the same time it considers it a duty to protect the proprietor in all his just rights " (*a*).

In the following year the same Judge made use of stronger language.

" The Court is of opinion that the plaintiff had no adequate reason for instituting the suit for restoration of the land from defendant. True it is optional with a janmakaran to sue for restoration, but he must show grounds for so doing, if within the usual allowed period of twelve years : " and again, " unless the kanamkaran fails in his engagement to pay rent, or unnecessarily damages, alters, or otherwise destroys the mortgaged land, he has a right to expect he shall not be removed before the expiration of the twelve years " (*b*).

These are the earliest expressions of judical opinion which have been discovered as to the twelve years' term.

In Moideen *v.* Koomareen Nambudri Mr. Cook, as Sub-Judge of Calicut in 1855, gave a decree for redemption although the suit was brought within twelve years. On special appeal, the Sudder Court (Messrs. Hooper, Morehead and Strange, JJ.) remanded the case with the following remarks :—

" The Court are of opinion that the question of usage involved in the suit has been improperly dealt with by the Lower Court. It is not denied that it is the prevailing usage in the country of the parties to the suit that the mortgages should run for a period of twelve years, before the expiration of which the mortgagee cannot be displaced. It is objected that proof is wanting that the mortgagee paid a fee for the renewal of the mortgage. It appears to the Court that the deed having been renewed, every necessary condition for renewal must be held to have been fulfilled " (*c*).

And again on the 27th February 1856, on special appeal from a decision of Mr. Collett, who succeeded Mr. Cook as Sub-Judge of Calicut, the Sudder Court said :—

" The Sub-Judge has omitted to take notice of the plea raised

(*a*) A. S. 75 of 1853, Sub-Court, Calicut.
(*b*) A. S. 36 of 1854, Sub-Court, Calicut.
(*c*) S. A. 44 of 1855, Sudder Decisions, 1855, p. 137.

by the third defendant, one of the sub-mortgagees, that a mortgagee is not liable to be displaced until after a tenure of twelve years, such being a recognized usage of the country having the force of law."

Thenceforward the custom was established, and, when, on the 5th August 1856, the Sudder Court recorded Proceedings defining the various tenures in Malabar and the conditions attending each of them, the custom was duly set out.

Perhaps the vigorous language of Mr. Holloway, who had succeeded Mr. Collett as Sub-Judge of Calicut, did more to establish the rule than anything else. Extracts from his judgments are appended :—

"I deem it requisite to notice the doctrine asserted by the plaintiff in appeal that there is no injustice in procuring the restoration of land on payment of the sum advanced by the tenant. I utterly repudiate this doctrine. No janmakaran can in less than twelve years demand the restoration of the land of a kanamkaran except in case of the breach of express or implied covenants by such kanamkaran. Such a protection the custom of the country provides against the grasping avarice of proprietors, and it is only the strict preservation of the custom which can prevent this species of tenure from being a monstrous fraud in which the weak will always be the prey of the strong" (*a*).

"The record stood and now stands with an admission on the part of the appellants in this case that the person whom they sought to oust had in 1845-46 obtained a kanam claim of a certain amount from the janmi, one of themselves. In 1851-52, they seek to eject him on the ground that they have been able to make a better bargain with someone else. Now the custom of the country makes every demise on kanam a covenant for a quiet enjoyment of twelve years' duration. It is not in the power of the owner of the land to enhance his demands during that period, and no breach of his covenants on the part of the kanamkaran was then alleged or proved or has now been alleged and proved" (*b*).

(*a*) Zillah Decisions, Calicut Sub-Court, December 1855, p. 22.
(*b*) Zillah Decisions, Calicut Sub-Court, March 1856, p. 13.

"When a deed conveying a kanam or any other claim has been duly executed, the proof of any intrinsic defect in the claim which it purports to convey lies upon the executor of the deed. As his own deed, the rule of law is to construe it most strongly against him. On this ground, therefore, the question of earnest money cannot avail the appellant. I, however, entertain no doubt that indisputable proof of non-payment of earnest money would not invalidate a kanam deed. Such payments vary in amount and, in many cases, none such is made. When it is made, it is an accident and not an essential of the contract and is wholly irrelevant to the question of the validity of a deed, although it may sometimes, according to the custom of the country, be a question when, for other adequate cause, a kanam is extinguished before the lapse of the prescribed period. Even then, it is a question for the benefit not of the lessor but of the lessee, who although a defaulter is, according to authorities entitled to much respect, entitled to a return of a portion of the earnest money" (*a*).

(6) What constitutes forfeiture.

One of the earliest questions which came before the Courts for decision was in what circumstances the right to hold for twelve years was forfeited. In their definition of a kanam tenure, the Sudder Court stated :—

"The mortgagee has possession, recovering the interest of money he has advanced from the produce of the land and paying over the net profits to the landlord. Should he fail in the last respect, the amount is placed to the landlord's credit when the mortgage is paid off, allowance being made on the other side for any improvements which the mortgagee may have effected. Failure to pay over the net proceeds regularly to the landlord will not give the latter power to redeem his land before the expiration of the period stipulated or that of twelve years, unless there is an express condition to that effect in the deed. Any attempt, however, on the part of the mortgagee to defraud the landlord and usurp the property will give the latter that power."

(*a*) Zillah Decisions, Calicut Sub-Court, August 1856, p. 1.

Mere non-payment of rent therefore was held not to work a forfeiture. But the Sudder Court very soon modified their view, much to the chagrin of Mr. Holloway who was then Sub-Judge of Calicut. In A. S. 244 of 1855, Mr. Holloway writes :—

"If the case were one of first impression, I should confirm the Munsif's decree, because I am of opinion that the nature of the contract of kanam is not such as to render the right to hold the land so dependent upon the payment of rent as that the estate is defeated by failure to pay. I am clearly of opinion that the advance of the money is the condition and that arrears of purappad are the subject for a suit. This remedy too would be amply sufficient, for the penalty of costs and interest would be a sufficient punishment. I am quite clear too that the custom of Malabar never regarded one failure to pay as a ground for defeating the contract. It is obvious that there are other conditions, and that the mere condition of payment of purappad does not go to the whole of the consideration, and the plain rule of law is that, under these circumstances, the conditions are independent and not dependent conditions. The Sudder Court has, however, in unqualified terms, in its Proceedings dated the 1st October 1856, laid down that failure to pay pattam operates the avoiding of the whole kanam claim. I am bound by their decision, although dissenting entirely from the doctrine on which it is based. I hold the right of twelve years' enjoyment not dependent on the payment of rent merely and therefore not defeasible by failure to pay. The conditions are numerous on which the twelve years' quiet enjoyment are held. They are the enjoyment of the kanam money by the demisor without interest, the obligation on the demisor not to act against his demisee's title, and the obligation on the demisee not to commit waste and to treat the land in a husbandlike manner. To defeat the estate by a mere failure to pay the purappad is, as it appears to me, both opposed to legal principle and is the fruitful nurse of fraud of every description" (*a*).

Again and again, as Civil Judge of Tellicherry, he recorded his opinion but in vain.

(*a*) Zillah Decisions, Calicut Sub-Court, December 1856, p. 15.

"There is no doctrine in my judgment so unsatisfactory and more requiring equitable relief but I am bound by it."

"I do hope that some day, on more mature consideration, the Sudder Court will add to the many beneficial rulings with respect to Malabar, which have of late years emanated from them, and apply this doctrine solely to cases in which there is refusal to pay and the setting up of the title of another."

It was not until 1862 that a Bench of the High Court, consisting of Strange and Frere, JJ., re-considered the former ruling and held that mere non-payment of rent would not work a forfeiture (*a*).

This was re-affirmed by the same Judges in Krishna Mannadi *v.* Shankara Manavan and by Frere and Holloway, JJ., in Kunju Velan *v.* Manavikarama Zamorin Rajah (*b*).

As soon as this decision became known, the janmi proceeded to contract himself out of the rule. He introduced into his kanam deed the stipulation that, if rent was in arrears, the tenant should surrender when called on or simply that the tenant should surrender on demand. The first of these stipulations was treated by the High Court as a penalty against which the Courts ought to relieve (*c*). The second was held by Mr. Sharpe, District Judge, South Malabar, in Mamatha Koya *v.* The Valia Rani of the Keyeke Kovilagam, to be enforceable, and his decision was confirmed by the High Court (*d*). In Shekkara Paniker *v.* Raru Nayar, the High Court, (Kernan and Muttusami Aiyar, JJ.) held that, although the right to hold for twelve years was inherent in every kanam according to the custom of the country, it was competent to the janmi to exclude its operation by express agreement.

(*a*) Shaikh Rautan *v.* Kadangot Shupan, I Madras H. C., 112.

(*b*) S. A. 111 of 1862 and S. A. 84 of 1862. Extracts from the judgments in these cases will be found in a note appended to I Madras H. C., 112.

(*c*) Kottal Uppi *v.* Edavalath Thathan Nambudri, VI Madras H. C., 258.

(*d*) S. A. 32 of 1874, Innes and Kernan, JJ.

The kanam before them provided for the surrender of the property demised on demand and the High Court decided that, such being the case, the grantor could redeem without waiting for any fixed number of years (*a*).

In Puthenpurayil Kuridipravan Kanara Kurup *v.* Puthenpurayil Kuridipravan Govindan, the question before the High Court (Innes and Kernan, JJ.) was whether, where a document was described as a kanam deed, a clause to the effect that the land was to be surrendered "whenever the amount advanced is ready" entitled the mortgagor to redeem before the customary twelve years' term had expired. The District Judge of North Malabar, Mr. Reid, before whom the case came on first appeal, considered the question carefully and that officer's long judicial service in Malabar renders his observations, which will be found printed in the report, worthy of perusal.

The High Court, in upholding the decree of the District Judge, observe as follows:—

"We think that the clause to the effect that the property should be surrendered whenever the money is ready is not sufficient to show that it was the intention of the parties to enter upon a contract of mortgage, differing in its incidents from the ordinary kanam mortgage, whereby the mortgagee has a period of twelve years' occupancy before he can be redeemed.

"In a document in which the word kanam is used to express the nature of the engagement and in which provisions are introduced for compensation for improvements which point to a period of occupancy, such as is usual under a kanam, it seems to us that the clause relied on by the plaintiff must be read as referring to a period subsequent to the expiration of the usual twelve years.

"Having regard to the other terms of the document, it is not sufficient by itself to show that it was the intention of the parties that the kanam should enure as what is called a

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(*a*) I. L. R., II Madras, 193.

kattakanam which is redeemable at any time after its creation" (*a*).

In Ahmed Kutti *v.* Kunhamed, this question came again before the High Court (Muttusami Aiyar and Parker, JJ.). In the kanam deed under consideration in that suit the following clause had been inserted "when the paramba is demanded, I shall restore the same by receiving the kulikanam and kanam amount................ according to the custom of the country." The two lower Courts decided that the kanamdar, in the face of this clause, could not be held to be entitled to hold for twelve years and the High Court, in dismissing the second appeal, observed :—

"We are of opinion that the construction placed by the Judge on the kanam deed is correct. The words 'when the paramba is demanded, I shall restore,' are inconsistent with the intention that the terms should continue for twelve years certain. It is no doubt true that, when a kanam is granted, the primary intention is that it should be redeemed after the expiration of twelve years But when that intention is negatived, either expressly or by necessary implication by a special clause, we do not consider that we are at liberty to introduce into the document words which we do not find in it so to render the special provision operative only on the expiration of twelve years. The language of the document referred to in Puthenpurayil Kuridipravan Kanara Kurup *v.* Puthenpurayil Kuridipravan Govindan (*b*) is not the same as in the present kanam deed, nor have we that document before us" (*c*).

In P. Ramen Nambudripad *v.* Mahmed Kutti a kanam document containing a clause to the following effect came before the Sub-Judge of Calicut, Mr. E. K. Krishnan. "We have renewed this kanam demise to you on receipt of renewal fees leviable for a term of twelve years, but we reserve to ourselves the right of turning you out at any

(*a*) I. L. R., V Madras, 310. (*b*) I. L. R., V Madras, 310.
(*c*) I. L. R., X Madras, 192.

moment we like, provided we pay you your kanam and the proportionate part of the renewal fee received." The Sub-Judge considered this to be "a novel, capricious and highly iniquitous provision" and refused to give a decree for redemption and the High Court (Collins, C. J., and Muttusami Aiyar, J.) in dismissing the second appeal observed :—

"According to local custom a kanam is not redeemable in less than twelve years. The special clause which is referred to by the Court below should be read together with the rest of the document. So reading it, the intention appears to have been to provide for some special exigency rendering it necessary for the Devasam to redeem before twelve years and thereby to provide against arbitrary and premature eviction. It is not alleged that any such special exigency exists" (*a*).

This decision was followed in Mahomed *v.* Ali Koya decided in 1890 (*b*). There the District Munsif held that the property could be recovered by the plaintiff before the usual period of twelve years, because the kanam document sued on provided that the property should be surrendered on demand at any time within twelve years. The Subordinate Judge reversed this decision and the High Court (Muttusami Aiyar and Best, JJ.), on second appeal, upheld his ruling, observing that, if the translation of the stipulations in the kanam document adopted by the District Munsif was correct, the decision of the High Court in Shekkara Paniker *v.* Raru Nayar (*c*) would be authority in support of the finding of the Subordinate Judge, inasmuch as it was there held that, although the right to hold for twelve years was inherent in every kanam according to the custom of the country, it was competent to the janmi to exclude its operation by express agreement. It would accordingly have to be held that the agreement in the kanam document for the surrender of the property within twelve years was not unenforceable. But the

(*a*) S. A. 747 of 1885. Printed in the Malabar Law Reports, Vol. I., p. 50.
(*b*) I. L. R., XIV Madras, 76. (*c*) I. L. R., II Madras, 193.

stipulation in the kanam document was not for surrender on demand, but in case of necessity, the correct translation being "if at any time the property shall be necessary for you." Such being the case, the High Court was of opinion that the Subordinate Judge was right in holding that the case came within the decision of the Court in Ramen *v.* Mahmed Kutti (*a*) and that, in the absence of any special exigency, the suit was premature and must be dismissed. In two recent cases, where the lower Appellate Court considered that it was entitled in accordance with the principle laid down in this decision to refuse to decree surrender of land held on kanam before the expiry of the full term of twelve years, the High Court, on second appeal, has held that effect must be given to the stipulations set forth in the kanam documents. In Vaden Kunnath Bappoo *v.* Kayanta Akatt Ayissa (*b*) the stipulation was "if you stand in need of the paramba I shall surrender it on demand." The District Munsif held that under this clause the kanamdar was bound to surrender on demand. The District Judge set aside this decision, holding on the strength of Mahomed *v.* Ali Koya (*c*) that, in the absence of proof of any special exigency, the suit must be dismissed, but the High Court (Shephard and Boddam, JJ.) on second appeal reversed the decree of the District Judge and restored that of the District Munsif, observing as follows:—"We cannot agree with the District Judge in holding that any special exigency had to be proved before the janmi could put an end to the tenancy. Presumably the janmi would not have sued unless he wanted the land for some purpose or other. The document in Mahomed *v.* Ali Koya (*c*) is not before us." In the second case, Seeyalli Kandi Kalanekkandi Koyasan Kutti *v.* Perumal Tirumala (*d*), the kanam was one for ten years with a clause which the District Munsif interpreted as a stipulation that the kanamdars

(*a*) S. A. 747 of 1885.
(*b*) S. A. 1665 of 1898.
(*c*) I. L. R., XIV Madras, 76.
(*d*) S. A. 269 of 1899.

must surrender on demand. The District Judge, however, was of opinion that the proper translation of the stipulations was that the paramba should be surrendered when "the demisors should be under any necessity" and held that, on the authority of Mahomed *v.* Ali Koya (*a*), the plaintiff could not recover possession unless he proved some special exigency. When the case came on second appeal it was admitted that the correct translation of the clause was that the kanamdars agreed to receive the amount of the kanam and to surrender possession of the land, either after the expiry of ten years or sooner if the demisors called on them to receive the money, and the High Court (Boddam and Moore, JJ.) accordingly held that the decision in Mahomed *v.* Ali Koya (*a*) had no application to the facts of the case and that the defendants were bound to surrender on demand.

As there was a conflict between the decisions in the reported case, Mahomed *v.* Ali Koya (*a*), and that in the unreported case, Vaden Kunnath Bappoo *v* Kayanta Akatt Ayissa (*b*), a reference was recently made to a Full Bench which (White, C. J., and Bhashyam and Moore, JJ.) was of opinion that Vaden Kunnath Bappoo *v.* Kayanta and Akatt Ayissa (*b*) was rightly decided and dissented from the decision in Mahomed *v.* Ali Koya (*a*) to the effect that "special exigency" must be proved by the janmi before he could redeem a kanam which had not run for the full term of twelve years (*c*).

The result of the decisions appears to be that while, as a general rule, the Courts will uphold the right of a kanamdar to hold for the full term of twelve years, yet that, if there is a clear and distinct stipulation in the kanam document to the effect that he is liable to be ejected at some earlier date under certain circumstances, the Courts must give effect to that stipulation.

(*a*) I. L. R., XIV Madras, 76. (*b*) S. A. 1665 of 1898.

(*c*) Kelu Nedungadi and another *v.* Krishnan Nayar and others, S. A. 1563 of 1901.

In every case where the janmi takes advantage of the stipulation in the kanam document, entitling him to oust the kanamdar before the full term of twelve years has elapsed, the kanamdar is entitled to a refund of a proportionate share of the renewal fees which are calculated on the understanding that there is to be quiet enjoyment for twelve years.

This principle was recognised by Mr. Holloway in 1856 as "based upon authorities entitled to much respect" (*a*) by Mr. Sharpe, as District Judge South Malabar, in 1874 (*b*) and by Mr. Wigram on several occasions.

In a recent case from North Malabar, to which allusion has already been made, where the kanam was for ten years with a clause to the effect that the kanamdar must surrender on demand, the District Judge held, on the authority of the decision in Kammaran Nambiar *v.* Chindan Nambiar (*c*), that the kanamdar was not entitled, on being evicted before the expiration of the full term of ten years, to a refund of any portion of the renewal fees. It was however, pointed out by the High Court (Boddam and Moore, JJ.) in second appeal that the decision quoted did not apply. That was a case in which certain lands were held on a perpetual lease which provided that the lease should be forfeited if the rent was allowed to fall into arrears. The rent fell into arrears, but as it was shown that the tenant had paid consideration for the lease, the District Judge held that, though the tenant had forfeited the lease, the forfeiture could not by analogy to an ordinary kanam be enforced until the landlord had repaid the consideration. The High Court (Muttusami Aiyar and Best, JJ.) however refused to accept this view and observed as follows:—"In the case of a kanam what is

(*a*) Zillah Decisions, Calicut, August 1856, p. 1.

(*b*) Mamatha Koya v. The Valia Rani of Koycke Kovilagam, S. A. 32 of 1874.

(*c*) I. L. R., XVIII Madras, 32.

forfeited is the right to retain possession for the full period of twelve years, the liability to repay the debt being in no way affected. Whereas in the case of a lease the consideration paid for it is exhausted by the grant of the lease and the tenant's forfeiture of the lease cannot operate to convert the original consideration into a debt" (*a*). It is clear that this decision has no bearing on the question as to whether a kanamdar, who, in accordance with a clause in the document under which he holds, is ousted before the expiry of the full term, is entitled to a refund of a proportion of the renewal fees, and the High Court accordingly held that the janmi could not in equity be allowed to retain the whole of the renewal fees as he had by his own act rendered it impossible for the kanamdar to have the benefit of enjoyment for the full term to secure which the fees had been paid (*b*).

As regards the other circumstances which would work a forfeiture of the twelve years' term, there does not appear to be any difference of opinion. Fraudulent conduct on the part of the tenant derogating from his landlord's title, commission of wilful waste and failure to cultivate in a husbandlike manner, have in various cases been held sufficient. Denial of the landlord's title has also always been held sufficient. As to this reference may be made to Ramen Nayar *v.* Kandapuni Nayar (Frere and Holloway, JJ.) (*c*) and Mayavanjari Chumaren *v.* Nimini Mayuran (Frere and Holloway, JJ.) (*d*). In a very recent case, Ramen Nayar *v.* Vasudevan Nambudripad, however Benson and Bhashyam Aiyengar, JJ., where a kanamdar, holding under a kanam by which a period of fifty-nine years was provided for redemption, had denied his janmi's title and a suit was accordingly brought for redemption before the fixed period had elapsed, decided as follows: "In our opinion

(*a*) I. L. R., XVIII Madras, 32.

(*b*) Seeyali Khandi Kalanckkandi Koyassan Kutti *v.* Perumal Tirumala, S. A. 269 of 1899.

(*c*) Ramen Nayar *v.* Kandapuni Nayar, I Madras H. C., 145.

(*d*) Mayuvanjari Chumaran *v.* Nimini Mayuram, II Madras H. C., 109.

this is an anomalous mortgage under the Transfer of Property Act and, even assuming that the mortgagor's title was disclaimed by the mortgagee, such disclaimer could not entail a forfeiture so as to entitle the mortgagor to sue for redemption of the mortgage before the expiration of the fifty-nine years. The decisions cited for the respondent were all cases in which it was held that the customary period of twelve years for which a kanam runs in Malabar, in the absence of any period being fixed in its deed, cannot be availed of by a mortgagee who has disclaimed the mortgagor's title or committed any waste, and no case has been cited in which it has been held that according to the local usage (Section 98, Transfer of Property Act) in Malabar a mortgagee for a contractional term of years forfeits the term contracted for by denying the mortgagor's title" (*a*). With all due deference to the learned Judges who passed this decision, I cannot see how the present case can be differentiated from those dealt with in the decisions relating to ordinary kanams that I have alluded to the Madras High Court Reports. A kanam, where no term of years is mentioned in the deed, is a mortgage for a contractual term of twelve years just in the same sense that the mortgage dealt with in this decision is one for a contractual term of fifty-nine years. On the first opportunity this question should, in my opinion, be referred to a Full Bench for adjudication.

In 1855 Mr. Holloway, as Sub-Judge, Calicut, says: —

"While the landlord covenants to allow twelve years' quiet enjoyment, the tenant on his part covenants to do nothing against the permanency of his landlord's rights, and, if as alleged, a bond essential to the irrigation of these lands has indeed been destroyed, the tenant would by such act lose the benefit of his covenant and would be compellable to return the land" (*b*).

(*a*) I. L. R., XXVII Madras, 26.

(*b*) A. S. 157 of 1855, Zillah Decisions, Calicut Sub-Court, August 1856, p. 20.

And again in 1859 Mr. Holloway, as Civil Judge, Tellicherry, held :—

"I am bound by the practice of Malabar to hold that under such circumstances the janmi has a right to terminate the contract for twelve years' quiet enjoyment, which is dependent upon the adhesion of the tenant to his covenants. Waste, and cutting trees without permission is obviously waste, is a breach" (*a*).

In a recent case, Mallarkandi Imbichetti *v.* Narayana Menon, the High Court (Moore and Michell, JJ.) had before it the question as to whether wilful waste on the part of the kanamdar was a sufficient ground for the forfeiture of the kanam. It was there observed :—

"It is next urged that, even if it be found that extensive waste was committed, it should not be held that the appellant has, on that account, forfeited his right to continue to hold the lands. There does not seem to have been any serious contention as to this before the lower Courts. On the contrary, it would appear to have been taken for granted that, according to the custom prevailing in Malabar, if wilful and extensive waste was proved, forfeiture would follow. There are not, as far as we can find, any reported decisions on this point. In Mr. Wigram's book on Malabar Law, he observes that in various cases wilful waste has been held sufficient to work forfeiture of a kanamdar's right to continue to hold the land, and he quotes two decisions of Mr. Justice Holloway passed by him when in Malabar to that effect. For the appellant no cases reported or otherwise have been cited in support of the contention now raised. We do not consider that we should be justified under these circumstances in interfering with the finding of the lower Appellate Court on this question" (*b*).

In the same case it was held that, although the kanamdar could be compelled to surrender the land, it could not be held that he had forfeited his right to the refund of the kanam amount paid by him. The Judges observed :—

" We do not understand why the plaintiffs have not been

(*a*) A. S. 211 of 1859, Tellicherry.

(*b*) Madras Law Journal, Vol. IX., 306, at p. 308.

called on by the lower Appellate Court to refund to the appellant the amount of the kanam paid off by the 1st defendant whose rights he has purchased It cannot be held that he has in consequence of the waste committed on the property forfeited the right to this refund. A reference to Ramen Nayar *v.* Kandapuni Nayar (*a*), and Mayuvanjari Chumaran *v.* Nimini Mayuran (*b*), shows that, even in the cases reported there, where the kanamdars had denied the title of their landlords and had in consequence lost their right to hold for twelve years, it was not held that they had forfeited the amount of their kanams" (*c*).

On the authority of a passage in Major Walker's treatise, it has been argued that there is a forfeiture if the tenant burn or bury a corpse in a paramba without the consent of the janmi (*d*). But this was negatived by Mr. Reid, as Civil Judge of Tellicherry, in 1873 (*e*). Cutting trees in a paramba will amount to waste, if they are the property of the janmi, or if the cutting was an injury to the janmi's reversion. But if the trees were the property of the tenant and he replaces them by others, that is a kind of permissive waste which the custom of the country allows (*f*).

(7) Essentials of the contract.

It appears always to have been held that non-payment of earnest money or renewal fees does not invalidate a kanam deed which has been duly executed and delivered, and that such payments are an accident and not an essential part of the contract (*g*).

(*a*) I Madras H. C., 445. (*b*) II Madras H. C., 109.

(*c*) Madras Law Journal, Vol. IX., 306.

(*d*) "If the kudian should burn or bury a corpse in the paramba or cut a tree without the consent of the janmi, in this case also he forfeits his kanam money and is deprived of the paramba" (Major Walker's report (1801), p. 10).

(*e*) A. S. 350 of 1873, Civil Court, Tellicherry.

(*f*) As to this reference should be made to Section 10, Act I of 1900 (Madras), and I. L. R., XXIV Madras, 47.

(*g*) Zillah Decisions, Sub-Court, Calicut, March 1856, p. 13, July 1856, p. 37, August 1856, p. 1, and March 1857, p. 36.

Whether an agreement to renew is a sufficient answer to a suit for redemption, is a question which has come before the Courts on several occasions. Of course the tenant must show that he has given consideration for the agreement and that he is entitled to specific performance. If the agreement is in writing and acknowledges receipt of more than one hundred rupees for renewal fees, it requires registration. In a very recent case, Achutan Nambudri *v.* Koman Nayar, it has been held that, where there is only an agreement to renew a kanam for twelve years and the owner sells the property to a third person who purchases with notice of the prior agreement, such third person can sue to eject the person who is in possession and who is entitled to get the kanam renewed under the agreement, notwithstanding the fact that the person in possession would be in time at the institution of the suit for suing for specific performance of the prior agreement. The facts were as follows. The suit was to recover two items of land demised on kanam by the owner to the first defendant. The plaintiff had obtained a melcharth from the owner with authority to redeem the lands. The owner had also received from the first defendant a puramkadam of five times its amount of the original kanam. The second defendant, deriving title to the lands from the first defendant by way of gift, pleaded that the owner of the property had agreed to grant a renewal of the kanam to the first defendant and that therefore the plaintiff could not redeem.

The High Court (Benson and Bhashyam, JJ.) passed the following judgment :—

" It is argued on behalf of the appellant (plaintiff) that the kanam held by the second defendant was really a lease, and that, as an agreement to renew a lease is a lease, according to the definitions of that term in Section 3 of the Indian Registration Act, the registration of that document was compulsory under Section 17 (*d*) of the Act, and also that though the agreement contemplated the execution of a further document, yet clause (*h*) of Section 17 of the Registration Act did not exempt the agree-

ment from registration, inasmuch as the exemption under clause (*h*) is limited only to the instruments specified in clauses (*b*) and (*c*) of Section 17. It is further contended that if the kanam held by the second defendant is to be regarded in law as a mortgage, not as a lease, the agreement to give a renewed kanam will be for the original kanam amount and also for the puramkadam, the aggregate of which sums is more than one hundred rupees, and that under the Transfer of Property Act, Section 59, the kanam which was intended to be created can be effected only by an instrument in writing registered and that therefore the second defendant at the date of the suit had acquired no interest in the property which would bar the plaintiff's right to redeem the then subsisting mortgage, the term of which had expired. It is not necessary in this case to decide whether the kanam is to be regarded as a lease, and not merely a mortgage, as, in our opinion, the plaintiff must succeed on the second ground. The second defendant's pleader argues that at the date of the suit the second defendant was in a position to enforce specific performance of the contract to renew evidenced by the agreement, though she may now be barred by limitation from doing so.

"The fact, if it be so, that the second defendant was then in such a position, does not, in our opinion, satisfy the requirements of the Transfer of Property Act, the policy of which is to secure a public registry of mortgages affecting immoveable property exceeding one hundred rupees in amount.

"In the absence therefore of a registered instrument in support of the second defendant's alleged title to hold the kanam for a further period of twelve years, we must hold that the second defendant has no valid answer to the plaintiff's claim to redeem" (*a*).

It frequently happens that a kanam deed and counterpart are drawn up by the parties and registered but that they are not exchanged. Sometimes they are kept by the parties who executed them, at other times they are placed in the hands of a third party. Questions then arise as to the relation of the parties. The new contract is not complete until delivery of the deed, but, if the mortgagee has

(*a*) S. A. 29 of 1901, Madras Law Journal, Vol. XIII., p. 217.

done all that it was necessary for him to do to obtain delivery, a Court of Equity, is, it is submitted, bound to uphold his right to possession. The dispute between the parties is usually in respect of some exaction claimed by the janmi in addition to the customary fee of twenty to twenty-five per cent. on the kanam, but there do not appear to be any valid reasons why the Courts should not in such cases enquire whether the customary fee has been paid.

(8) Rights of mortgagor.

The rights of the mortgagor are to redeem at the end of the term on payment of what is due, to receive payment of the rent fixed as it falls due, or to deduct it from the kanam, if it is in arrears at the time of redemption, and to create what is called a melkanam or higher mortgage.

In decrees for redemption, it is usual to apportion the kanam equitably among the mortgagee and his sub-mortgagees. The rent is a first charge on the kanam, then an admitted sub-mortgage, and lastly the original mortgage. Nearly every case of redemption is brought into Court as there are the conflicting interests of mortgagees and sub-mortgagees to be adjudicated on, and the parties can seldom agree as to the compensation payable for improvements The period allowed for redemption under the Limitation Act is sixty years from the time when the right to redeem or to recover possession accrues, *i.e.*, in an ordinary kanam when twelve years have elapsed from the date of the kanam. A new period of limitation is allowed if, before the expiration of the period prescribed for a suit, an acknowledgment in respect of the right to redeem has been made in writing, signed by the party against whom the right is claimed or by some person through whom he derives title. The acknowledgment need not be addressed to the mortgagor and it may be signed by an agent duly authorized.

On taking an account between the janmi and the kanam-

dar, the former on redemption has by custom a right to deduct all arrears of rent due to him from the sum which he has to pay to the latter before recovering possession of the land. As to this the High Court (Turner, C. J., and Brandt, J.), in Kanna Pisharodi *v.* Kombi Achen, held as follows :—

"With regard to the claim to set off arrears of rent for more than three years against the kanam amount, we observe that, in the Sudder Court's proceedings of the 5th August 1856, this right was distinctly recognized. Those proceedings are in accordance with the customary law recorded in 'Vyavahara Samudra,' a work to which an antiquity of over two hundred years is attributed.

"It is no doubt true that, where a set-off is pleaded, only so much of it can be allowed as falls within the period of limitation, if the set-off consist of a debt resulting from an independent transaction. But the claim that a deduction should be made from the kanam amount on account of arrears of rent is not properly described as a set-off.

"By the custom of the country the kanam amount is looked upon as a security for the rent, and on the expiry of the term an account is taken between the janmi and the kanam holder, and, while there is allowed to the kanam holder interest on the sum paid by him as kanam and the value of improvements, there is allowed to the janmi whatever rent may be in arrear, with interest on the arrears. In taking this account, allowance is made to the landlord of all the rent in arrear, and not only of so much as could have been recovered by the janmi if he had brought a suit for the rent.

"This is in accordance with general law that, where parties reserve the settlement of the items of cross and connected accounts to a particular period, the several items will then be admitted or disallowed independently of any question as to whether a suit could be brought to recover them separately. The janmi has the right either to sue for the rent as it accrues due, or to claim the enforcement of the security afforded by the kanam amount when the account between all parties is adjusted" (*a*).

(*a*) I. L. R., VIII Madras, 381.

Attention may also be drawn to Achuta *v.* Kali where it was held that a janmi, being entitled on redemption of the land to set off a claim for arrears of rent due to him by the kanamdar against the claim of the latter for compensation for improvements. a pledge of his rights to a third party by the kanamdar will not prejudice the right of the janmi to set-off his claim for arrears of rent against the sum found due to the kanam holder for improvements. The Judges (Hutchins and Brandt, JJ.) there observed :—

"The janmi has obtained the usual decree for eviction of the kanamdars on payment of the kanam amount and compensation for improvements less three years' rent due in arrears. It is admitted that a janmi can set off arrears of rent against the kanam amount, but it is contended that he has no right to set off his rent against the improvements where such improvements have been hypothecated to a creditor of the kanamdar who has been joined as seventh defendant.

"It seems to us that the creditor can only go against the net amount found due by the janmi. The appellant (seventh defendant) claims under kanamdars whose tenure is liable to periodical adjustments, and who could not create any right not subject to the same adjustments At each adjustment the kanamdar has a right either to a renewal or to be paid his kanam amount and compensation for improvements less the rent, if any, which may be due by him in arrears. We see no difference in this respect between the kanam amount and the improvements. Indeed it was admitted, and is well-known, that the value of improvements is often included at a renewal in the new kanam amount, and if this were done, it is conceded that the janmi would have the right of set-off.

"A kanamdar can pledge all his rights or he can pledge the net sum which may become payable to him at adjustment, but he cannot, it seems to us, say that the compensation is ever payable to him apart from a general settlement, nor can he give a separate title to it as against his landlord. Regarded as a debt, the claim to compensation is a mere inchoate right, which only becomes perfected at the eviction and subject to

its customary incidents, and, if we regard the appellant as a mortgagee of the actual trees or buildings constituting the improvements, his possession is no better. The janmi has a right to these upon payment of any sum which may be found due at the adjustment. The appellant cannot be in a better position as a mere creditor than he would be after foreclosure, and if he had foreclosed, he would himself have become the kanamdar. The right of the set-off as against the kanamdar is not disputed "(*a*).

On referring to the full report of this case, it will be found that the District Munsif allowed the janmi to set-off against the kanam amount the full amount of arrears of rent due, but the District Judge on appeal held that the janmi was entitled to rent for only the three years prior to the suit. The High Court, on second appeal, it will be observed, did not express dissent from the view taken by the District Judge on this point, but it is doubtful if the question was raised before them for it was the seventh defendant who appealed and the janmi does not seem to have put in a memorandum of objection claiming to be allowed to set-off the full amount of the arrears of rent. Among the many complaints which Mr. Logan as Special Commissioner made with respect to the administration of justice by the Courts in Malabar one related to this question. Commenting on it, in his minute on Malabar Land Tenures, Sir Charles Turner, who, it will be remembered, was one of the Judges who had taken part in the decision in Kanna Pisharodi *v.* Kombi Achen (*b*), observed as follows :—

"Before I leave the question of kanam it will be convenient to refer to the complaints made by Mr. Logan that arrears of rent in excess of the sum recoverable as a contract debt are allowed by the Courts to be deducted from the kanam amount on redemption. The kanam is the security for the rent, and at the end of the term an account is taken between

(*a*) I. L. R., VII Madras, 545.
(*b*) I. L. R., VIII Madras, 381.

he janmi and the kanamdar of the sums payable by each to the other. The kanamdar is credited with the value of improvements and the amount of the kanam less the customary deduction. He is debited with the arrears of the purappad or excess of rent above the interest on the kanam. If these sums were payable in respect of independent transactions Mr. Logan would be right in saying that only so much can be set-off as would be recoverable by suit. But where there are mutual debts in respect of the same transaction and an account is taken at its close their fair claims are allowed to each party. This is the general law and is in strict accord with Malabar usage" (*a*).

There does not appear to be any reported decision of the High Court on this question since the date (1885) of this minute. The janmi can also, without waiting till the period of redemption arrives, sue to recover arrears of rent due by the kanamdar by a separate suit and the High Court (Muttusami Aiyar and Best, JJ.) have held, in Achutan Nayar *v.* Keshavan, that in such a case a janmi, who has obtained a decree for arrears of rent, may sell the kanam right before the expiry of twelve years. The Judges observed as follows :—

"It is contended that the kanam right is not liable to be sold in satisfaction of the decree before the expiry of twelve years from the date of the kanam to the first defendant. No doubt, according to the custom of the country, a kanam is, in the absence of a contract to the contrary, redeemable only after the expiry of the period of twelve years. But this custom cannot supersede the general rule of processual law that a judgment-creditor is entitled to attach and sell the judgment-debtor's property. It is not denied that an ordinary judgment-creditor, who is not the janmi, would be entitled to bring the kanam right to sale even before the expiry of twelve years. We see no reason why a janmi, who is a judgment-creditor, should be in a different position. The right to set-off arrears of rent against the kanam debt and value of improvements when the kanam becomes redeemable is an additional security

(*a*) Sir C. Turner's minute on Malabar Land Tenures, pp. 52 and 53.

for the benefit of the janmi, but it does not follow that he cannot sell the kanam at an earlier date if he has obtained a decree for arrears of rent. Such sale will not ordinarily put an end to the kanam, but only transfer the kanamdar's interest, such as it is, to the purchaser at the execution sale" (*a*).

If the janmi requires a further advance on the security of his property, it is usual to apply to the kanam tenant. The further loan is termed puramkadam and becomes an extra charge on the property which must be repaid at the time of redemption. A fresh arrangement will also be made as to the rent payable.

It was formerly the impression that a kanam tenant was entitled to the option of making any further advance, and that a melkanam to a stranger was invalid unless this option was given and declined.

The whole question has been discussed at length by Mr. Wigram in his finding on an issue referred for trial in Marakar *v.* Munhoruli Parameswaran Nambudri which is as follows :—

" The issue referred to me for trial is, " whether by the usage of Malabar, the first, second and third defendants were disentitled to grant the plaintiff a melkanam, without offering the fourth defendant the option of making a further advance in consideration of a renewal of the kanam." No evidence was adduced by the parties as to the custom, and it only remains to deal with it on the authorities.

" The question may be almost said to be concluded by authority. In Pramatan Tupen Nambudripad *v.* Madatil Ramen (*b*), the High Court (Frere and Holloway, JJ.) held that the first mortgagee had a right to a hold for twelve years, but they tacitly admitted that the second mortgagee might pay him off after that period. In Ali Hussan *v.* Nilakandan Nambudri the High Court (Scotland, C. J., and Frere, J.) held that in the case of an otti tenure, it was settled law, that the first mortgagee was entitled to the option of making any further

(*a*) I. L, R., XVII Madras, 271. (*b*) I Madras H. C., 296.

advance required by the janmi (*a*). That decision was based on a decision of the Sudder Court, passed in 1860 (*b*). Nothing was then said, and in none of the Sudder decisions was it ever suggested, that the right to make further advances was also an incident of a kanam tenure.

" Recently, in Kunhamu *v.* Keshavan Nambudri (*c*), the High Court (Turner, C. J., and Kindersley, J.) held thatthere is no authority to support a kanamkar's claim to the privilege of making further advances.

" The only authorities on the other side, as far as I know, are :—

" Paidal Kidavu *v.* Parkal Imbichuni Kidavu (*d*), in which the High Court (Scotland, C. J., and Phillips, J.) accepted the law as laid down by the Principal Sudder Amin (Mr. Pereira). The only real value of that decision is that the Nayar Vakil who appeared for the appellant does not seem to have disputed the Principal Sudder Amin's law.

" A suggestion made by the High Court (Scotland, C J., and Collett, J.) in Tapan Paramuthen Nambudripad *v.* Keshava Terumumbu. The Judgment says : " Though it may be a fact that the period of twelve years of the defendant's kanam demise has now expired, yet he may have a perfect defence on the merits to a suit now by a melkanamdar as plaintiff seeking to eject him (*e*).

" In Mr. Strange's report on affairs in Malabar is the following passage :—

" ' It is obviously highly essential that the tenant should not be disturbed from possession arbitrarily and at unduly short periods, and the recognized rule is, that, if he should have paid a fine for his lease, it slould endure for twelve years, under certain reservations as when the landlord, if a Rajah, dies when he should renew with his successor, or when the landlord requires more money on the land and the tenant will not

(*a*) I Madras H. C., 356.

(*b*) Padinjare Kovilagata Valia Tamburatti *v.* Kunduvetti Kadiragata, Sudder Decisions, 1860, p. 249.

(*c*) I. L. R., III Madras, 246.

(*d*) I Madras H. C., 13.

(*e*) S. A. 474 of 1868, H. C.

provide it and it is obtainable from another, or when rents are not paid ' (*a*).

" The meaning of this I take to be, that, as a general rule, there was an implied covenant in every kanam for quiet enjoyment for twelve years, but that forfeiture of the term might occur from one of three causes :

" (*a*) Death of the grantor, if a Rajah.

" (*b*) Refusal to make further advances during the pendency of the term.

" (*c*) Non-payment of rent.

" Nothing is here said about the right of the kanamdar to hold over after the expiry of his term.

" The origin of the melkanam was, I believe, as follows :—

" In ancient days, the kanam was simply a lease for three to six years, with a year's rental paid in advance, and at the end of the term fixed on, the rent was re-adjusted by mediators. This system gradually developed into what was practically a fixity of tenure at a low rent, and the practice sprang up of levying a second year's rental by way of fine or premium at the end of twelve years. As long as there was a good feeling between the landlord and his tenant, there were no disputes. But in process of time, what with the imposition of a Government tax on the land, a general advance in the cost of living, and the assertion by the tenant of greater independence, the relations of landlord and tenant were changed. The landlord was perhaps in difficulties or was avaricious, and he began to look about for persons who. either from motives of private animosity or simply from land-hunger, were willing to advance a substantial sum for the privilege of cultivating the land. Such persons were easily found, and the old tenant found himself evicted when perhaps he had only had possession for two or three years from the date of his last renewal. The Courts when called on to decide between landlord and tenant, at first introduced the rule that the tenant ought to have the option of making further advances, and finally settled the matter

(*a*) Report of the 25th September 1852, Correspondence on Mappilla Outrages, Vol. I., p. 470.

by holding that the tenant was entitled to twelve years' quiet enjoyment.

"The effect of the second rule was, in my opinion, to abrogate the first, which was at the best an illusory remedy. The landlord might enter a fictitious sum in the melkanam deed, which the first tenant must at once refuse to pay and the first tenant's right was determined.

"When the twelve years' rule became the settled law of the country, we hear nothing more of the right to make further advances. Thenceforward the kanam is treated as a mortgage redeemable after twelve years.

"The case of an otti was different. That was always a mortgage for a substantial sum, and generally nothing was left to the mortgagor but the bare equity of redemption.

"If he wished to sell this, he was bound to offer it to his mortgagee in preference to a stranger. In fact, it was rather the right of pre-emption than the right to make further advances which resided in the otti mortgagee.

"If the kanam is to be treated as a usufructuary mortgage, and, after a current of decisions for thirty years, it is too late to revert to the primitive tenure, it seems to me that it is in accordance with equitable principles to hold that the mortgagor may assign his equity of redemption either absolutely or by creating a second mortgage. No one in Malabar disputes that he can do the former, and the greater power seems to me to include the less.

"The melkanam cannot of course take effect so as to pass possession of the land till the end of the first term.

"Until fixity of tenure is secured by the Legislature to the first kanam tenant, the rule which the kanamdar contends for, is practically useless. The janmi may turn him out after twelve years and re-grant to another. So that it really amounts to this:

"Shall the redemption suit be carried on in the name of the original mortgagor or in the name of the second mortgagee?

"My finding on the issue referred is, that by the usage of Malabar, the first, second and third defendants were not dis-

entitled to grant the plaintiff a melkanam without offering the fourth defendant the option of making further advances in consideration of a renewal."

The High Court (Innes, C. J., and Muttusami Aiyar, J.) accepted the finding of the District Judge. They remarked that, if they had been aware of the decision of the High Court (Turner, C. J., and Kindersley, J.) in Kunhamu *v.* Attapureth Illath Keshavan Nambudri (*a*), they might not have considered it necessary to refer the question to the District Judge for a finding. They then add as follows:—

"The reason for the distinction arising in favour of an otti holder that he shall have this option is very apparent. He has advanced almost to the full value of the property, and is in a position little short of that of a vendee. Having staked so much upon the property, it is quite intelligible that persons so situated should secure their holding from future disturbance by an understanding entered into at the time of the contract that they should have the option of making further advances at the expiry of their term, and that a customary rule should ultimately take the place of such an understanding so generally entered into" (*b*).

What was held in Kunhamu *v.* Attapureth Illath Keshavan Nambudri (*a*), was that the prior right of an ottidar to make further advances was established by authority, but that there was no authority to support a kanamdar's claim to a similar privilege.

(9) Right of mortgagee.

The rights of the mortgagee are to assign his term, to foreclose and to claim compensation for unexhausted improvements at the time of redemption.

The right of the kanam tenant to assign absolutely or by sub-mortgage his interest in the land has always been recognized. In the case of an absolute assignment, it is usual for the mortgagee to address an enak or notice to the mortgagor. This is shown to the mortgagor and then retained by the mortgagee, and is sometimes the

(*a*) I. L. R., III Madras, 246. (*b*) I. L. R., VI Madras, 140.

only evidence of the transfer. In the case of a sub-mortgage, the mortgagee cannot, of course, create a higher title than he possesses, and if holding a kanam, he professes to demise on kanam, the sub-mortgagee can only enjoy the remainder of the mortgagee's term. Should the tenure be determined by the original mortgagor, a mortgagee who has assigned his term and subsequently obtains a renewal from his janmi, does so for the benefit of his sub-mortgagee. Any private arrangement between the original mortgagor and mortgagee during the pendency of the term in fraud of the sub-mortgagee is invalid, more especially, where, as usually happens, the original title-deed is in the hands of the sub-mortgagee.

The right to apportion the kanam on various parcels of land is a right which can only be exercised by the mortgagee with the assent of his mortgagor. But if the original mortgagee has taken upon himself to apportion it, the mortgagor may recover the separate parcels on payment of proportionate kanam. A more difficult question is whether, if some of the parcels after assignment to a third party are redeemed on payment of proportionate kanam, the remaining parcels can be redeemed on payment of the balance. If the deed of assignment did not specify what proportion of the kanam was to be reserved on the parcels assigned, it would probably be held that it is open to the Court to take evidence as to the proportion to be charged on such parcels, and *à fortiori* where a Court attaches and sells in execution of a decree against the mortgagee one out of several parcels held on kanam. There is no direct decision on the point. But in one case, Mr. Holloway in 1856 allowed a kanam tenant to establish his right to one-ninth of the kanam over one out of nine items of land which had been attached (*a*). Mr. Reid in 1877 as Civil Judge of North Malabar (Tellicherry) appears, however, to have taken a different view (*b*).

(*a*) Calicut Zillah Decisions, January 1856, p. 3.
(*b*) S. A. 611 of 1877.

The principle to be followed would seem to be that the mortgage may be split whenever the conduct of the mortgagee has destroyed the indivisibility of the original contract.

Whether a mortgagee could surrender his holding and demand back his money before the expiry of the term was long a matter of doubt. Before the twelve years' rule was firmly established, the Sudder Court held that, if the kanam deed contained no limitation to the contrary, the right to demand his money at any time was a right inherent in every mortgagee (*a*). On the other hand, Mr. Holloway, as Sub-Judge of Calicut, held that as the letting of land on kanam is an implied covenant for twelve years' quiet enjoyment, mutuality required that the money should not be demandable within that period (*b*). The same opinion is also expressed by the High Court (Frere and Holloway, JJ.), in Vayalil Pudia Madathemmil Moidin Kutti Ayissa *v.* Udaya Varma Valia Rajah, although the question actually for decision was whether, when the demisor of land under a kanam agreement was unable to give possession, the demise might repudiate the contract and recover the amount advanced. They observed :—

"The contract of kanam is substantially an agreement by one party, on consideration of the receipt of a sum of money from the other, to place real property in possession of that other for a period of twelve years. As the land cannot be reclaimed before the lapse of twelve years, it seems only consistent with justice that the money should not be reclaimable until that period has elapsed. Where, however, the demisor is unable to give possession, it is reasonable that the demisee should be allowed to repudiate the contract and sue for his money" (*c*).

The purchaser at a Court sale of a mortgagor's equity of redemption is not personally liable for the mortgage debt. He is responsible only to the extent of the mortgagor's interest in the property (*d*).

(*a*) Sudder Decisions, 1855, p. 109.

(*b*) Calicut Zillah Decisions, 1856, p. 3. (*c*) II Madras H. C., 315.

(*d*) Cf. A. S. 929 of 1881 and 79 of 1882, South Malabar.

It has been held by the High Court (Kernan and Muttusami Aiyar, JJ.), in Chathu *v.* Kunjan that, under the Transfer of Property Act, a usufructuary mortgagee has no right to a decree for foreclosure, nor can he, in the absence of a contract to that effect, sue for the sale of the mortgaged property (*a*). Muttusami Aiyar, J., in Ramuni *v.* Brahma, no doubt expressed an opinion that a kanam document which was before him in that case combined in it the ingredients of both a simple and an usufructuary mortgage and then went on to observe as follows:—

"According to the usage of Malabar, it is a mortgage with possession for twelve years, with a right in the kanamdar to appropriate the usufruct in lieu of interest, or of both principal and interest, and the janmi is also bound, under the contract, to pay the kanam amount on the expiration of twelve years. It is clear from the Report of the Law Commissioners of the 15th November 1879, that there may be a combination of a simple and an usufructuary mortgage or of an usufructuary mortgage and mortgage by conditional sale. In such cases, the intention was that the mortgagor and mortgagee should have such rights and liabilities as are created by the Act with reference to each of the forms so combined. Such being the case, the kanam-holder may, as the holder of a simple mortgage, sue for the sale of the kanam property, but he cannot claim foreclosure either as a simple or an usufructuary mortgagee" (*b*).

As to this *dictum* it is pointed out by Messrs. Shephard and Brown, in their commentaries on the Transfer of Property Act, that the terms of the document actually before the learned Judge are not given in the report, but that, unless there is an express covenant to pay on the expiration of twelve years, such a transaction clearly does not import any power to have the property sold in satisfaction of the debt (*c*).

In a recent case (Sridevi *v.* Virarayan) where the Sub-

(*a*) I. L. R., XII Madras, 109. (*b*) I. L. R., XV Madras, 366.

(*c*) Commentaries on the Transfer of Property Act by Shephard and Brown, 5th edition, p. 347.

Judge, following the judgment of Muttusami Aiyar, J., in Ramunni *v.* Brahma (*a*), gave a kanamdar a decree for sale of the mortgaged property, the High Court (Subramania Ayyar and Davies, JJ.) reversed his judgment with the following observations:—

"In the instrument sued upon there is no covenant to pay, nor was there any evidence that a promise to pay was one of the incidents of a kanam according to usage. It has been uniformly held that a kanam in the mortgage aspect of it is a usufructuary mortgage, and, except an observation of the late Muttusami Aiyar, J, in Ramunni *v.* Brahma (*a*), that it is both a simple and a usufructuary mortgage, there is no authority in support of the view that it is a simple mortgage; nor do we see anything in the character of the transaction or its incidents to make it a simple mortgage. We are, therefore, unable to hold that it is so. In this view, the present suit for the recovery of money and sale of the mortgaged property in default of payment was unsustainable" (*b*).

The extent of the mortgagee's right to compensation for unexhausted improvements will be dealt with in chapter XI.

(10) Miscellaneous.

The kanam has been treated throughout as a usufructuary mortgage for twelve years. But the parties are at liberty to contract that it shall last for a longer period, and it is not unusual to find a term of twenty-four, thirty or thirty-six years agreed upon.

Reference may be made to Keshava *v.* Keshava, where Innes, J., expressed the opinion that, if in any mortgage the period for redemption is postponed to a fixed date by special agreement, effect should be given to such agreement (*c*).

In former times, there was but little distinction between a kanam-pattam and a panayam-pattam. Major Walker treats them as synonymous terms. The Sudder Court, in

(*a*) I. L. R., XV Madras, 366. (*b*) I. L. R., XXII Madras, 350.
(*c*) I. L. R., II Madras, 45.

describing the land tenures of Malabar in 1856, mentions only the thodu panayam, or simple pledge without possession. But there are other tenures, known as koyu (ploughshare) panayam or kari (plough) panayam, which are pledges with possession. Unless the contract specifies the rights of parties, it is not usual to imply covenants for twelve years' enjoyment or to compensation for improvements in documents of this nature. The undaruthi panayam is a mortgage which redeems itself within a fixed period, a proportion of the principal being each year liquidated by the surplus usufruct after providing for payment of interest.

It is a common practice in the case of kanam mortgagees that the possession of the land does not pass to the mortgagee. Simultaneously with the kanam deed, a lease agreement is executed by the mortgagor, promising to pay the mortgagee a stipulated rent equivalent to the interest on the mortgage. The two agreements are, it is believed, invariably intended to be dependent contracts, and the rights of the parties must be ascertained by reference to both. The mortgagee has two remedies. He may sue for possession of the land on the basis of the lease when the lease is determined, or he may sue for possession of his money after the twelve years have expired. Under the Limitation Act, XV of 1877, payment of rent under the lease must be regarded as payment of interest on the mortgage and gives a new starting point for limitation.

The above remarks apply only when the kanam deed and lease agreement are contemporaneous. Where the lease agreement was executed three years after the original kanam deed, it was held by the High Court (Turner, C. J., and Kindersley, J.), in Palliagatha Ummer Kutti *v.* Abdul Kader, that the two contracts were independent (*a*).

(*a*) I. L. R., III Madras, 57.

CHAPTER X.

THE OTTI.

Otti signifies pledge. An otti may be defined as a usufructuary mortgage, the usufruct of which extinguishes the interest, leaving only a nominal rent to be paid to the mortgagor. The same incidents are attached to an otti tenure as to a kanam, and in addition the mortgagee has the right of pre-emption if the mortgagor wishes to dispose of the property. An ottidar may redeem a prior kanam (*a*).

The twelve years' term does not appear to have been applied to the otti tenure until some time after it was recognized as in ordinary incident of a kanam. In defining an otti the Sudder Court says:—

"Where no period has been stipulated, the landlord may pay off the mortgagee at any time" (*b*).

In 1862 Mr. Holloway as Civil Judge, Tellicherry, held as follows:—

"I give no conclusive opinion as to whether the twelve years' rule applies to an otti. On principle, it would seem that it should, for an otti is a kanam and something more, and it is difficult to see why he who has obtained a larger right can reasonably be in a worse position than he who holds a smaller one of the same nature" (*c*).

In Edathil Itti *v.* Kopashon Nayar, the High Court (Scotland, C. J., and Strange, J.) expressed the opinion

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(*a*) Kunhamu *v.* Attapureth Illath Keshavan Nambudri (I. L. R., III Madras, 246).

(*b*) Proceedings of the Sudder Court dated 5th August 1856.

(*c*) A. S. 28 of 1862, Civil Court, Tellicherry.

that the otti mortgagee was entitled to twelve years' quiet enjoyment, but refused to decide the point as it did not in reality arise in the case before them (*a*).

The point was eventually decided by the High Court (Strange and Frere, JJ.) in Kumini Amma *v.* Parkam Kolusheri. The Judgment runs :—

"We think that an otti, like a kanam, cannot be redeemed before the lapse of twelve years from the date of its execution. An otti in fact only differs from a kanam in two respects. First, in the right of pre-emption which the otti holder possesses in case the janmi wishes to sell the premises, and secondly, in the amount secured, which is generally so large as practically to absorb in the payment of the interest, the rent that would otherwise have been paid to the janmi, who is thus entitled to a mere pepper-corn rent" (*b*).

The otti holder forfeits his right to hold for twelve years by denying his janmi's title (*c*).

The right of pre-emption was first recognized by Mr. Cook as Sub-Judge of Calicut in 1854 (*d*) and again by Mr. Holloway in the same Court in Chaten *v.* Ramen Nayar (1856) where he held that, till the ottidar refused to purchase, "to no other person could the janmam right by the custom of Malabar be sold." The Sudder Court (Hooper and Goodwyn) confirmed this decision and laid down that the janmi, having parted with his unfettered right of sale and retained only a conditional right to sell on the ottidar's refusal to purchase at a certain fixed amount, the janmi's sale to a third party was an infraction of his contract to the otti holder and consequently invalid (*e*).

In Kuni Taruveyi *v.* Achabi Uma this decision was. followed and it was observed by the Judges (Hooper, T. L.

(*a*) I Madras H. C., 122. (*b*) I Madras H. C., 261.

(*c*) Kellu Eradi *v.* Perapalli (II Madras H. C., 161).

(*d*) Zillah Decisions, 1854, p. 17, Calicut Sub-Court.

(*e*) Sudder Decisions, 1857, p. 121.

Strange and H. D. Phillips, JJ.) that a party holding under the tenure of otti had the right of pre-emption and that they considered that that privilege depended "upon fixed and well recognized usage in Malabar" (*a*).

In A. S., 64 of 1859 (Tellicherry), Mr. Holloway laid down the rule that the otti mortgagee had a right to purchase at a reasonable rate.

It has been held by the High Court (Turner, C. J., and Forbes, J.) that the otti holder did not forfeit his right of pre-emption by setting up further charges which he failed to prove (*b*).

The right of pre-emption includes the right to make any further advances required by the janmi so that the janmi cannot create a second mortgage without first consulting the first mortgagee. This was expressly decided by the High Court (Scotland, C. J., and Frere, J.) in Ali Hussain *v.* Nilakandan Nambudri. In this case both the lower Courts had held that the right of the otti holder to make further advances existed during the pendency of the first term of twelve years only, but the High Court said :—

"It has been frequently decided and is now well settled that an otti mortgagee must, if the janmi proprietor is desirous of obtaining a further advance by way of mortgage on the property, be allowed as a matter of right the option of making the advance himself, before the lands can be offered on superior mortgage and be made a valid security for an advance by a stranger, and no distinction has been made between the rights of the first mortgagee before and after the lapse of the twelve years. In this case, however, it is contended that the right to exercise this option is not co-existent with the redemption of the original mortgage, but is limited to the term of twelve years from the date of that mortgage, during which the right to redeem is suspended.

(*a*) Sudder Decisions, 1859, p. 169.

(*b*) Konnoth Tuluvan Paramban Kunhali *v.* Vannathan Vittil Kinathe (I. L. R., III Madras, 74).

"No authority has been referred to which in any way countenances this limitation of the right, nor is there any evidence of a custom or usage to that effect, and in reason and principle we can see no ground for the distinction.

"During the twelve years the otti holder is a mortgagee, and so he continues until the land is redeemed, and the option in question is evidently in respect of his interest as mortgagee in almost the whole value of the land. The benefit to the mortgagee, too, does not really arise until after the twelve years, for, during that period, no advance can be obtained and applied so as to dispossess him of the land. Our opinion, then, clearly is that the right of the janmi proprietor as regards the option to which the otti holder is entitled is the same after as before the expiration of the twelve years, and consequently that the decrees of the lower Courts are not sustainable in law" (*a*).

A "kanam free from payment of rent" is not equivalent to an otti so as to give a right of pre-emption. This was decided by the High Court (Holloway and Kindersley, JJ.) in Kunhi Paricy *v.* Rameth Chathapa Kurrup (*b*).

An otti mortgagee, if he avails himself of his right of pre-emption, must pay whatever sum is *bonâ fide* offered to the janmi for his equity of redemption but the otti holder is entitled to be fully informed as to the circumstances and amount of the offer before electing to buy. Public notice of, and the option of bidding at, a Court sale of the janmi's rights do not constitute a valid offer of pre-emption so as to deprive the otti holder of his right of pre-emption, if he does not purchase the janmi's rights (*c*).

A janmi having conveyed certain land upon a veppu (equivalent to an otti) created a further charge on the land, without giving the veppu holder the option of making the advance required. In execution of a decree against the janmi, a judgment creditor brought to sale the right of the janmi in the land subject to the further charge. In a

(*a*) I Madras H. C., 356. (*b*) S. A. 142 of 1870, H. C.

(*c*) Cheria Krishnan *v.* Vishnu, I. L. R., V Madras, 198 (Kernan and Kindersley, JJ.).

suit, Vasudevan *v.* Keshavan, brought by the veppu holder to set aside the auction sale on the ground that his right of pre-emption was injured thereby, it was held by the High Court (Turner, C. J., and Kernan, J.) as follows:—

"The veppu holder was not entitled to have either the janmam-panayam or the auction sale set aside, but, assuming that he came into Court within time, he was entitled, on tendering the price, to claim that the janmam-panayam should be transferred to him, and, if no offer was made to him of the land at the price bid by the highest bidder at the auction sale, he was entitled to require that on payment of that price the sale should be made with him" (*a*).

Reference may also be made to Kanharan Kutti *v.* Uthotti (*b*), where Cheria Krishnan *v.* Vishnu (*c*) was followed and it was held (Handley and Weir, JJ.) that an ottidar's right of pre-emption which had not been waived by him constituted a good defence to a suit to redeem. In Vikku *v.* Kutti the question as to waiver of an ottidar's right of pre-emption was considered and it was held (Muttusami Aiyar and Best, JJ.) that an ottidar loses his right of pre-emption, if he refuses to bid at a Court sale of the land comprised in his otti held in execution of a decree against the Karnavan and senior Anandravan of the tarwad in which the janman right is vested, after having been specially invited to attend and exercise that right, and makes no offer to take the property for a long time after the Court sale. Best, J., observed :—

"It was no doubt held in Cheria Krishnan *v.* Vishnu (*c*) that the mere fact that public notice was given of the intended sale, at which therefore the ottidar might have come and bid, was not sufficient to deprive him of his right of pre-emption. That does not appear, however, to be a case in point, for here there was something more than the public notice. There was special notice sent to the ottidar himself,

(*a*) I. L. R., VII Madras, 309. (*b*) I. L. R., XIII Madras, 490.

(*c*) Cheria Krishnan *v.* Vishnu, I. L. R., V Madras, 198 (Kernan and Kindersley, JJ.).

and it is found, as a fact, that he was present at the sale and declined to bid for fear his doing so might involve him in litigation" (*a*).

The question as to how the ottidar's right of pre-emption is affected by the law of limitation, the Transfer of Property Act and the Specific Relief Act has been considered in certain recent decisions. In Krishna Menon *v.* Kesavan (*b*) the facts were as follows. Certain land in Malabar was in possession of the defendants being held by them as otti mortgagees under instruments executed in 1873 and 1876. The plaintiff, having purchased the janman right in 1877, sued in 1893. The High Court (Subramania Ayyar and Benson, JJ.) held that the right of pre-emption held by the defendants was not extinguished under Section 28 of the Limitation Act and that they were not precluded from asserting it by Article 10 in the 2nd Schedule attached to that Act. The Judges observe as follows :—

"It is contended that the defendants, having failed to sue to enforce their right within the year prescribed by Article 10 of the Limitation Act, the right was extinguished under Section 28 of that enactment and could not therefore be set up as a defence in the suit. This contention is unsustainable. The defendants as 'otti' mortgagees have since the date of the mortgages admittedly held possession of the lands to which the right of pre-emption attaches. If the defendants had as plaintiffs to enforce their right of pre-emption, it was absolutely unnecessary for them to pray for any possession. All they could have claimed was a decree directing that, on payment of the proper price, the right to redeem which the janmi had and of which the plaintiff had become the assignee, be transferred to them But a mere right to redeem is not capable of possession within the meaning of Section 28. That Section contemplates suits, which a person who is kept out of property, admitting of physical possession, could have brought for such possession. It is true that the language employed in some of the decided cases in describing the nature of the right to redeem

(*a*) I. L. R., XV Madras, 480. (*b*) I. L. R., XX Madras, 305.

is not quite uniform. For example, in Chathu *v.* Aku (*a*), it was stated to be a right of action only, while the leading case of Casborne *v.* Scarfe (*b*) lays down perhaps more correctly that the right was not a mere right of action, but an estate in the land. Nevertheless in a case like this, where the mortgage in a measure partakes of the nature of a lease, even an English lawyer would, in accurate modern technical language, only say the mortgagor was seized of the right to redeem while the mortgagee was in possession of the land.

* * * * "It is thus clear, apart from authority, that the right in question is not capable of possession within the meaning of Section 28, and that the extinctive prescription referred to therein is inapplicable in the present instance. Chathu *v.* Aku (*c*) already cited and Kanharan Kutti *v.* Uthotti (*d*) are clear authorities on the point. In the former case it was held that, where the equity of redemption of a certain estate became on the death of the mortgagor the property of two divided branches of a Malabar tarwad, and the rents and profits of the land paid by the mortgagee were enjoyed by the representative of one branch for fifteen years to the exclusion of the other branch, such enjoyment was not adverse possession within the meaning of Section 28. In the second case cited above Handley and Weir, JJ. dealing with a contention similar to the present held as follows. 'But Section 28 only applies to suits for possession of property, third defendant has no need to bring any suit for possession of the property in question. He has already obtained a decree for such possession. The only suit he would have to bring to assert his right of pre-emption would be a suit to set aside the sale to the plaintiff and the first and second defendants and to compel them to convey the property to him on his paying the price they had paid, and, even if such a suit is barred, the right is not extinguished by Section 28' (*e*).

* * * * "The third contention was that, even if the right was not extinguished under Section 28, yet, as it became barred under Article 10 on the expiry of a year from the

(*a*) I. L. R., VII Madras, 26. (*b*) II W. and T. L. C., 1035.
(*c*) I. L. R., VII Madras, 26. (*d*) I. L. R., XIII Madras, 490.
(*e*) I. L. R., XIII Madras, 490.

registration of Exhibits B and C, the right cannot be urged by way of defence. This contention is manifestly untenable. For, if, notwithstanding that an otti mortgagee's right to sue to enforce his right of pre-emption has become barred, that right of pre-emption, owing to the inapplicability of Section 28 to the case, is still unextinguished, it is difficult to see on what principle such right is to be held to be unavailable by way of defence " (*a*).

In Ramasami Pattar *v.* Chinnan Asari this view of the law has not been followed by the High Court (Shephard and Bhashyam Aiyangar, JJ.) (*b*). The facts of the case were as follows :—" On the 31st July 1872 an instrument of mortgage was executed by Appavu Pillai and his son in favour of Samu Aiyar. According to that instrument the mortgagors delivered over to the mortgagee ' for the interest on the sum of one hundred rupees (then advanced) the possession of the land '—and the instrument concludes with the following covenant made in favour of the mortgagee :—' If we assign our right over these properties to any one, the land delivered possession of to you for appropriating the interest shall be assigned to you alone and it shall not be assigned to anybody else. When we assign the land, we shall receive fifty fanams more from you, and then we shall assign the land for these two amounts together.' On the 25th July 1873 Appavu and his family sold their interest in the land to Vedanayakam. Before July 1893 Vedanayakam's interest was sold in execution of a decree against him and bought by the plaintiff, who instituted the present suit in February 1897."

Shephard, J., in his judgment in the case, pointed out that the defendant was seeking to use the covenant above recited against a person who bought in 1893 from one who himself bought in 1873, and held as follows :—

" Under the covenant the defendant has no interest in the property. That is clear, for Section 54 of the Transfer of Property Act expressly says that a contract of sale creates no

(*a*) I. L. R., XX Madras, 305. (*b*) I. L. R., XXIV Madras, 449.

interest in the property to which it relates. His right can be no other than a right to specific performance available under Section 27 of the Specific Relief Act, against a transferee who has taken with a notice of the covenant. Of what can the plaintiff be said to have had notice? By reading the mortgage instrument he must have learnt that his vendor's vendor might, on the defendant being informed of his intention to sell, have insisted on the property being transferred to him. He would have learnt that there was a convenant and that the occasion when it should have been enforced had happened twenty years ago. In my opinion notice of a contract, such as is required to satisfy the section, must be notice of an existing obligation. When a transferee hearing of a contract is also informed that the time for performance has long passed without anything being done, the inference he would naturally draw is that the right has been waived or otherwise discharged. It is not pretended that any fact was brought to the plaintiff's knowledge except the fact that the mortgage contained a covenant for pre-emption, and that notwithstanding it the vendor had sold his interest to Samu Aiyar. I find therefore that the plaintiff is not a transferee who took with notice of the contract now sought to be enforced.

"Assuming that there was notice of the contract and that it was otherwise a valid contract, I further hold that, inasmuch as no suit to enforce it could now be brought, the defendant cannot be allowed to use it as an answer to the plaintiff's suit. The case relating to covenants in leases for renewal are exactly in point, and having regard to them, I think we may disregard the recent case Krishna Menon *v.* Kesavan (*a*) which is in the main founded on Kanharan Kutti *v.* Uthotti (*b*). In these cases, moreover, it seems to have been assumed that the right of pre-emption involved an interest in the property. If that was the case, the covenant would, according to the ruling in The London and South-Western Railway Co. *v.* Gomm case, be open to the objection that it is an attempt to create a perpetuity (*c*). Such distinction as can be made between a

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(*a*) I. L. R., XX Madras, 305. (*b*) I. L. R., XIII Madras, 490.
(*c*) L. R., 20 Ch. D., 562.

covenant in a lease to renew and a covenant in a deed of mortgage or sale to convey by way of sale is in favour of the defendant. For a covenant to renew is a covenant which, according to the English law, runs with the land and which, according to Section 109 of the Transfer of Property Act, creates a liability enforceable against the lessor's transferees, whereas covenants of the latter sort are only enforceable under Section 40 of the same Act against transferees who have taken without consideration or with notice. It would be strange if the person claiming under such a covenant were put in a better position than a person claiming under a covenant to renew."

The following extract from the judgment of Bhashyam Aiyangar, J., deals with the same question :—

"Assuming that the mortgagee secured a valid right of pre-emption, such right was infringed in 1873 when the equity of redemption was assigned by the mortgagor to the plaintiff's vendor who, in his turn, assigned the same in 1893 to the plaintiff. The mortgage deed was in the possession of the mortgagee, and the clause of pre-emption finds a place in it. The appellant will not be entitled to specific performance of the contract of pre-emption, if either the plaintiff or his vendor was assignee for value without notice of the contract of pre-emption. Whether the plaintiff or his vendor was or was not an assignee without notice, the appellant's cause of action for specific performance accrued in 1873, and his right to enforce the right of pre-emption is *primâ facie* hopelessly barred both under Articles 113, or 118 of Act IX of 1871 and under Article 10, Act XV of 1877, and the Vakil for the appellant has not been able to show on what circumstance he relies in bar of the ordinary law of Limitation. * * * * The fact that the appellant has ever since 1872 been in possession of the property as mortgagee cannot save him from the operation of the law of Limitation if he were to sue for specific performance of the contract of pre-emption and, under the Transfer of Property Act, he cannot acquire title as transferee by sale of the mortgaged property without a registered instrument. The Vakil for the appellant principally relied upon the decisions of this

Court in Kanharan Kutti *v.* Uthotti (*a*) and Krishna Menon *v.* Kesavan (*b*), both of which were suits for redemption against a mortgagee, who was in possession and pleaded a right of pre-emption which an ottidar has under the customary law of Malabar. In both these cases it was held, and if I may say so rightly, that a suit by a pre-emptor is not a suit for possession of the property in respect of which he has the right of pre-emption and that therefore his right of pre-emption is not extinguished by operation of Section 28 of Act XV of 1877."

The facts of Kanharan Kutti *v.* Uthotti, to which allusion has already been made, were as follows. A janmi, having demised certain land on otti to the third defendant in 1869, sold the janmam title to the plaintiff and the first and second defendants in 1886. In 1888 the third defendant made a further advance and obtained a renewed demise from the first and second defendants The plaintiff then sued to recover his share (the third defendant being in possession) on payment of one-third of the otti amount. The Lower Courts held that the plaintiff's purchase was invalid as against the third defendant who, as an ottidar, had a right of pre-emption. It was urged that the third defendant's right of pre-emption was barred, but the High Court (Handley and Weir, JJ.) held as follows:—

"Another point raised is that the third defendant's right of pre-emption is extinguished by Section 28 of the Limitation Act, more than six years having elapsed since the sale, but Section 28 only applies to suits for possession of property. The third defendant has no need to bring any suit for possession of the property in question. He has already obtained a decree for such possession. The only suit he would have to bring to assert his right of pre-emption would be a suit to set aside the sale to the plaintiff and the first and second defendants and to compel them to convey the property to him on his paying the price they had paid, and, even if such a suit is barred the right, is not extinguished by Section 28" (*a*).

In Ramasami Pattar *v.* Chinnan Asari it appears to have

(*a*) I. L. R., XIII Madras, 490. (*b*) I. L. R., XX Madras, 305.

been further argued that, though Section 28 might not be applicable to the case, yet, that, as a suit by the pre-emptor for specific performance would be barred by limitation, the pre-emptor cannot urge his right by way of defence. This argument was overruled as follows:—" This contention is manifestly untenable. For, if, notwithstanding that an otti mortgagee's right to sue to enforce his right of pre-emption has become barred, that right of pre-emption, owing to the inapplicability of Section 28 to the case, is still unextinguished, it is difficult to see on what principle such right is to be held to be unavailable by way of defence. But in neither of those cases was the question raised or argued with reference to the stringent provisions of Section 54 of the Transfer of Property Act, nor was the attention of the Court drawn to Section 60 of the Transfer of Property Act and in particular to the conspicuous absence therein of the usual saving clause 'in the absence of a contract to the contrary.' When a mortgagee is allowed to plead in bar of redemption a contract of pre-emption secured by the mortgage instrument itself, you really import into Section 60 the above saving clause which has been deliberately omitted by the Legislature. The mortgagees in those cases, like the mortgagee in this case, have been in possession simply as mortgagees, and such possession, how long soever it may continue for less than the statutory period, cannot extinguish the right of redemption " (*a*).

This decision has been followed in a later decision (Keloor Nayar *v.* Chandu Nayar) where the High Court (Bhashyam and Moore, JJ.) held as follows.

" Assuming that the mortgagee had a right of pre-emption, that right accrued on the execution of the sale-deed of the mortgagee's favour of the plaintiff which was registered on the 15th June 1887 and, under the third column of Article 10 in the second Schedule attached to the Limitation Act, the period of one year allowed to bring a suit to enforce the

(*a*) I. L. R., XXIV Madras, 449, at pp. 464, 465.

right of pre-emption commenced to run from the date of registration, inasmuch as the subject-matter of the sale, which was the equity of redemption, did not permit of physical possession. It is therefore clear that at the date of the filing of this suit the first defendant's right to enforce his right of pre-emption was barred by limitation. Following the decision of the Master of the Rolls in Swain *v.* Ayres (*a*), and that of this Court in Ramasami Pattar *v.* Chinnan Assari (*b*), we hold that the alleged right of pre-emption was not available as a defence to the present suit for redemption" (*c*).

Akin to an otti, but not necessarily carrying with it a right of pre-emption, is the peruvartham mortgage which is peculiar to the Palghat taluk of the Malabar district. The peculiarity of this form of mortgage is that, in redeeming his property, the mortgagor does not pay the actual sum advanced, but the market value at the time of redemption (*d*).

There is no practical distinction between the otti veppu and palisa madakkam deeds.

Between the otti deed and the final sale deed (attiper) some one or more of four deeds is interposed, termed respectively :—

1. Kaividuga otti.
2. Ottikumpuram.
3. Nirmudal or kudimanir.
4. Janmam-panayam.

Major Walker apparently treats all these deeds as parts of the sale-deed, although he also calls them various degrees and species of mortgage. He says that, in disposing of janman property, the kaividuga otti is the first document to be executed. "By this deed the janmi consigns the paramba and its produce to the janmam

(*a*) L. R., 21 Q. B. D., 289.

(*b*) I. L. R., XXIV Madras, 449, at pp. 464, 465.

(*c*) S. A. 1605 of 1901.

(*d*) Shekari Varma Valia Rajah *v.* Mangalam Amugar (I. L. R., I Madras, 57).

kolunavan or purchaser. The janmi however still retains his janmam rights, which preclude the kolunavan from disposing of the paramba for more than he paid for it or on any other terms than on those he acquired it. But after executing the kaividuga otti the janmi is not at liberty to revoke it or to demand the paramba back by returing the money which he received from the janmam kolunavan." Further on in the same report he writes :—" There are various degrees and species of mortgage. The first is kaividuga otti. Kudimanir and ottikumpuram may also be considered as mortgages, since they lay an additional burthen on the property and make its redemption more difficult. As these deeds cannot however be executed in the first instance and must follow the kaividuga otti, on which an advance is made to the full value of the thing mortgaged, they are only to be considered as an appendage of it. Indeed it may be doubted whether any of those deeds answer to our ideas of a mortgage. They are more properly deeds of sale with reservation of certain seigniorial rights to the original proprietor, a mode of disposing of land highly feudal and still practised in some parts of Europe. The attiper is a positive deed of sale" (*a*).

The account given by Mr. Thackeray in his report dated the 4th August 1807, differs in many particulars with respect to all these deeds from that given by Major Walker. He writes as follows :—

"The janmakaran may dispose of his estate in a variety of ways. By the kaividuga otti he pledges his land and delivers it over to the mortgagee ; in this case, the proprietor receives from the mortgagee two-thirds of the value of the estate, but retains a certain quantity of interest in the land, which may be valued at one-third of the whole value : he must alienate this remaining quantity of interest in the land, before he loses the character of a proprietor. Rules are established for the adjustment

(*a*) Report by Major Walker on the Land Tenures of Malabar dated the 20th July 1801, pp. 1 and 13.

of rent and interest between the parties, and for the redemption of the land, on the repayment of the sum received by the proprietor.

"Otti is another contract, nearly the same, or rather another term for the same transaction. In both cases, the mortgagee, or tenant in possession, pays the surplus of rent above his interest to the proprietor.

"Otti kulikanam is nearly the same. If there be a difference, it seems to exist respecting the rules for the redemption of the land. These three contracts appear to be nearly the same. When the proprietor has once dipped his estate in one of these ways, he is often unable to pay off the incumbrance, the same indolence, extravagance, or bad luck, which forced him at first to encumber his estate, will probably oblige him to borrow again. In this case he executes another contract, termed ottikumpuram, and receives a further sum from the tenant, the amount of which is regulated on a certain proportion of the whole value, and he resigns a further proportionate quantity of interest in the land. The chief advantage which the tenant appears to derive from this second transaction is that he keeps the whole rent, without accounting to the proprietor, for the second advance is supposed to be so great that the whole rent can go no further than to discharge the interest.

"If the necessities of the proprietor require a further advance of cash, he executes the nirmudal, as it is termed, and receives a further percentage on the whole value of the estate, and resigns so much more of his interest, which becomes so faint that there is little chance of redemption. There appears to be some difference in different places in the conditions of the nirmudal. In some the option of redemption seems to reside with the tenant, in some the original proprietor still seems to have the option of redeeming the land, upon the payment of a fine in addition to the debt. The kudimanir seems to be nearly the same as the nirmudal. Where the option of redemption has been long in the possession of the tenant, the tenure is converted, by pledge, into a kind of freehold.

"There seems to be some varieties and niceties in the terms and conditions of these transactions in different places, which can only be ascertained in the Courts. All these deeds

do not seem to be in use everywhere, nor does the same percentage appear to be universally paid. There is another deed, termed janmam-panayam, which usually follows the nirmudal, and approaches nearer than any of the others to actual transfer. On executing this deed, the proprietor receives a further advance, and parts with almost his whole interest in the land. All these transactions are, in reality, transfers of property, because the tenant acquires a greater interest in the land than the original proprietor, but, in order to complete the sale, another transaction follows. The attipper, as it is termed, is executed, which irrevocably and completely transfers the property. The attiper must follow the other deeds, and appears to be invalid, unless they are previously executed, so that in those parts of the country where the three deeds, the otti, ottikumpuram and nirmudal are usual, the two last are sometimes executed at the same time with the attiper, merely to observe forms, but in some places, it would appear that the execution of the nirmudal is the only necessary preliminary to the absolute transfer of the property by attiper. The attiper seems to be in general use, and known by the same term from Karwar to Cape Comorin.

"In this manner, the proprietor gradually divests himself of his interest in the land, as his necessities oblige him to execute these preliminary acts, until by the attiper he loses the character, as he had before lost the most essential attributes, of a landowner" (*a*).

In defining the different tenures of Malabar, the Sudder Court treat the kaividuga otti, the ottikumpuram and nirmudal as redeemable, and the janmam-panayam as irredeemable (*b*).

In a paper on the Land Tenures of Malabar, Mr. Krishna Menon, a retired Sub-Judge, suggests that the word itself kaividuga otti (lit. that has slipped out of one's hand) indicates that the equity of redemption is lost, but

(*a*) Fifth report of the Select Committee, Vol. II., pp. 442, 443 (Higginbotham's Reprint).

(*b*) Proceedings of the Sudder Court, dated 5th August 1856.

adds that, if the mortgagee wishes to dispose of the estate, he is bound to give the option of purchasing to the janmi on repayment of the sum originally advanced by the mortgagee (*a*).

Mr. Krishna Menon treats the ottikumpuram as bearing the same relation to an otti as the punamkadam holds to a kanam and the janmam-panayam as equivalent to a melkanam, the otti holder having refused to advance any further sum. Mr. Wigram, as District Judge South Malabar, had to consider the nature of a kaividuga otti in certain appeals and on each occasion held that it was irredeemable. In one of his judgments he summed up the matter thus :—

"My theory has always been that, when once you enter on one of the four stages preliminary to the outright sale, the right of redemption is lost. Nor do I admit that an irredeemable mortgage is equivalent to an absolute sale. The right of preemption, if the mortgagee wish to part with his interest, is a substantial right. If a janmi parts with the visible emblems of *dominium*, e.g., the right to gather the first fruits, he must be held to part with the right which those emblems represent, *i.e.*, the right of redemption."

On appeal the High Court (Turner, C. J., and Muttusami Aiyar, J.) held that land demised on the tenure called kaividuga otti is redeemable. The following is an extract from the judgment delivered by Muttusamï Aiyar, J. :—

"The question for decision is, whether at its inception a kaividuga otti is not redeemable.

"On this point, there is a conflict of opinion among writers on the tenures of Malabar. It is not denied that the term kaividuga imports that some incident, inherent in an ordinary otti, is abandoned by the janmi or mortgagor, and the matter in contest is whether that incident is the right of redemption or the right of entry for the purpose of taking a certain share of the produce, as suggested by the District Munsif, or the power

(*a*) Published in the Malabar Law Reports, Vol. I., pp. 1—18.

to transfer the right of redemption to a third party when the otti holder refuses to make a further advance.

"In Thackeray's report, dated the 4th August 1807, the transaction is described as redeemable. In 1856, the Sudder Court described the tenure as follows, in their Proceedings of the 5th August,—'The landlord in the case of a kaividuga otti relinquishes the power of transferring the property to a third party and binds himself to borrow any further sum he may require from the mortgagee only. Should the latter decline to make a further advance, the landlord may pay off the mortgage and re-assign the property to another party.' Referring to this definition, Mr. Wigram observes that the same right is inherent in an ordinary kanam or otti, and that the word kaividuga (let slip though the hand) is superfluous.

"In Ali Husain *v.* Nilakandan Nambudri it was held that the otti holder was entitled only to the option of making a further advance before the lands under otti can be legally offered on a superior mortgage and as a security for an advance by a stranger (*a*). It may well be that this power of granting a second mortgage, in the event of the otti holder refusing to make a further advance, is the interest relinquished by a kaividuga otti.

"In Major Walker's report it is stated that by a kaividuga otti the janmi consigns the paramba and its produce to the janmam-kolunavan, or purchaser, the janmi retaining however his janmam right which precludes the kolunavan, or purchaser, from disposing of the paramba for more than he paid for it, or on any other terms than those on which he acquired it (*b*). But after executing the kaividuga otti the janmi is not at liberty to revoke it or to demand the paramba back by returning the money which he received from the janmam-kolunavan. Mr. Wigram has adopted this definition and held that the transaction was a sale, subject to the condition of re-purchase when the purchaser desires to part with his interest, and that the right infringed by assignment to a stranger

(*a*) I Madras H. C., 356.

(*b*) Report by Major Walker on the Land Tenures of Malabar, dated 20th July 1801.

was therefore a right of pre-emption. It must, however, be observed, that, according to Major Walker, the kaividuga mortgagor is bound only to re-pay the sum originally advanced and nothing more, although the market value may be considerably in excess of it. This incident suggests the inference that, if the transaction were at its inception a sale, the incident revived would be a power of re-purchase and not a right of pre-emption.

"In Wilson's Glossary the transaction is defined to be 'a kind of mortgage in Malabar by which, in consideration of a sum of money, the proprietor of an estate transfers it to the lender to hold without prejudice to his own proprietary right, but which precludes the mortgagee from disposing of the land to a third party for more than he paid or on any other terms than those on which he acquired the occupation. If he wishes to dispose of it, he is bound to give the proprietor the option of redeeming it' (*a*). The late District Judge referred to Gundert's Dictionary (1872) wherein a kaividuga otti is described to be 'a higher tenure than otti which leaves to the janmi merely nominal right.' The Judge also referred to the opinion of Mr Krishna Menon, a native of Malabar and at present the Subordinate Judge of Tinnevelly, that a kaividuga otti is not redeemable, though he confessed he was not confident of the soundness of that opinion, when he found that the present Puisne Judge of the High Court of Travancore (the District Munsif who heard this case) thought otherwise.

"The present District Judge of Calicut considers that the right of redemption is not lost.

"In Græme's Glossary it is stated to be an irredeemable mortgage, and in a note it is stated that the transaction is differently interpreted, and that some consider that what is relinquished is the right of gathering the first fruits inherent in a simple otti, while others hold that it is not redeemable and that the mortgagee cannot assign it. The report of Thackeray and the opinion of the Sudder Court are in favour

(*a*) Glossary of Judicial and Revenue terms by H. H. Wilson (1855), p. 249.

of the view that the tenure is redeemable, while, according to Major Walker and Mr. Græme, it is not redeemable

"It is also desirable to look to the various stages of mortgage which are common to the whole Province and see whether they throw light on the nature of the transaction. The several stages of a mortgage as showing the ancient usage of Malabar are kanam and otti, ottikumpuram and nirmudal. The distinction between kanam and otti consists in this, that in the latter the mortgagor is ordinarily taken to have received two-thirds of the value of his land, and the interest due on the debt is considered to be equal to the annual rent. Ottikumpuram is a higher stage of the mortgage. The mortgagor is taken to have borrowed ten per cent. or more of the amount of the otti. Under this tenure the mortgagor must also repay the further advance, with interest at ten per cent., when he pays off the otti. The next stage of the mortgage is nirmudal. This transaction is entered into when a still further sum is lent after the execution of the ottikumpuram. By this transaction the mortgagor gives up all but the right of water. The next transactions are janmam-panayam and attiper and there is no dispute that these are transfers of an absolute interest. In the proceedings of the Sudder Court, dated the 5th August 1856, it was observed that all the forms of mortgage prior to janmam-panayam and attiper were redeemable. Looking to the fact that, when the absolute interest is intended to be transferred, but only the form of pouring water remains to be gone through, the intention is indicated by the use of the word janmam, it is not likely that the word otti would be retained, as is the case in kaividuga otti, if an absolute interest was intended to be created. The view taken by the Sudder Court in 1856, that what is relinquished by a kaividuga otti is the power to borrow elsewhere in case the mortgagee refuses to make a further advance, appears to be reasonable with reference to the several gradations, by which the right of the mortgagor was lessened, and of the mortgagee enhanced, until the janmam right was transferred from one to the other by a janmam-panayam deed.

"Valuable as these opinions and references are, many of them have not the authority of judicial decisions, and in arriving at a judgment, it will be safe to rely in their absence mainly on

the evidence as to usage in the district to which the tenure is peculiar. The evidence produced in this case is fully set forth in the finding which the District Judge has returned. Although the appellants have examined but six witnesses, their evidence is confirmed by several instances in which a Kaividuga otti has been redeemed during a period of more than thirty years. We are, therefore, of opinion that we must accept the finding that the transaction is a mortgage which is redeemable" (*a*).

In this judgment it is to be observed that Mr. Justice Muttusami Aiyar expresses the opinion that, by entering into the transaction known as nirmudal, the mortgagor gives up all rights over the land dealt with, excepting the right of water. He has, in all probability, followed the definition of the word given in the Proceedings of the Sudder Court issued in 1856 regarding the Land Tenures of Malabar. It is very doubtful, however, if the meaning there attached to the word nirmudal can be accepted as correct. The late Mr. Arthur Thompson, I.C.S., when District Judge, North Malabar, was good enough to favour me with his opinion as to the correct interpretation to be placed on the words nirmudal and kudimanir. He considered that "mudal" was a concrete and not an abstract term. It meant property in the sense of the thing owned and not property in the sense of the right of ownership. In "nirmudal," "mudal" was used in its primary sense of "beginning" and "nirmudal" was equivalent to "nirmudalavadu," the idiomatic phrase found in all the Dravidian languages meaning "water, etcætera," that is the right to "water and everything else." As to the tenure called nirmudal he pointed out that Dr. Gundert, in his Malayalam Dictionary, defined the word as "Freehold property, equivalent to attiper or kudimanir." Kudimanir was, in Mr. Thompson's opinion, a tenure almost equal to a freehold by which all the body of property rights was gained without the crowning dignity (the right of transferring the pro-

(*a*) Kundu *v.* Impichi, I. L. R., VII Madras, 442.

perty to another). A payment not exceeding two fanams was annually made to the possessor of the title who could not redeem the land. Kudimanir and nirmudal were, Mr. Thompson considered, "identical tenures and the right under them was a janmam in everything but the name, *i.e.*, the holder of a nirmudal was not entitled to call himself a janmi." The question as to whether the grantor of a nirmudal retains any rights whatever over the property dealt with is, however, of no great importance, as such documents are now scarcely ever met with.

CHAPTER XI.

KULIKANAM—COMPENSATION FOR IMPROVEMENTS.

The kulikanam, or reclaiming lease, is the mode by which waste lands are brought under garden cultivation. The cultivator is entitled to enjoy the lands, rent free for twelve years, and, at the expiry of that term, must surrender to his landlord on receiving full compensation for improvements or enter into new arrangements for future enjoyment.

The law relating to compensation for improvements made by tenants in the Malabar district is to be found in Act I of 1900 (Madras).

Major Walker treats of the kulikanam form of lease in his Report under the head of ali-kulikanam and states that the agreement lasts for three years (*a*). But it is now the well settled rule that this tenure carries with it the right to hold for twelve years. The tenure is thus described in an extract from the general Report of the Board of Revenue, dated 31st January 1803 :—

"Kulikanam pattam, tenure by labour, usufructuary tenure, by which the janmakaran gives a spot of land to a person who undertakes to fence and plant it with productive trees for which he is ensured in the possession of it for a specified period (twelve years) free from all charges. The trees do not generally produce for the first six years, but the kulikanamdar has five or six years' enjoyment of the ground in a productive state. At the expiration of the lease, the janmi has the right of resumption, on paying the rents for the buildings and wells according to appraisement and for the plantation at fixed rates. The resumption of this tenure is seldom enforced, but

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(*a*) Report of Major Walker on the Land Tenures of Malabar (1801).

the kulikanamdar enjoys the lease at an easy rent till reimbursed. This tenure can be transferred or mortgaged, the soil to one, the building to another, which tends to the deterioration of the estate" (*a*).

In defining a kulikanam, the Sudder Court say:—

"Where no express period has been stipulated, this lease is considered to run for twelve years, otherwise, for such period as may have been agreed upon. At the expiration of either of these periods, the landlord may either renew the lease to the same tenant, paying him the value of his improvements, which may also be invested as a mortgage, or he may satisfy all the tenant's claim upon the land for improvements and may let the property to a new tenant. Compensation is allowed for buildings and fruit-producing trees and shrubs of every description. In the event of a tenant failing to reclaim the land, plant trees and otherwise fulfil the conditions of the deed, he may be dispossessed by the landlord before the expiration of the period specified. The landlord may exercise a similar power in the event of the tenant setting up a fraudulent title to the land" (*b*).

In 1872 the Sub-Judge of Tellicherry, Mr. Krishna Menon, thus described the tenant's right to improvements:—

"The Malabar law secures to the tenant the right of being paid for all kinds of improvements, irrespective of the period during which he remains in possession of the land into which he has introduced such improvements. Under this law there are three kinds of improvements for which a tenant is entitled to compensation. The first is kulikur, which includes all fruit-bearing trees, shrubs and vines, the second chamayam, which comprises all sorts of buildings, such as houses, cow-stalls, tanks, wells, granaries, walls, etc., and the third vettukanam, which includes every act which is calculated to improve the soil of the land, such as clearing of waste, manuring, etc. The law encourages cultivation to such an extent as to entitle even a trespasser to the value of improvements, subjecting him

(*a*) Fifth Report of Select Committee, Vol. II., p. 440.
(*b*) Proceedings of the Sudder Court, dated the 5th August 1856.

only to a deduction of one-tenth upon the value of improvements" (*a*).

The following brief account of the law believed to be in force in Malabar as regards the grant of compensation for improvements to tenants prior to the passing of Act I of 1887 (Madras) was given by Mr. Wigram in the first edition of this work.

"It is the practice of the Courts to hold that in a kulikanam (reclaiming lease) or an ordinary kanam or any superior tenure there is an implied covenant to compensate for all unexhausted improvements. This change was probably introduced when the Courts began to recognize a twelve years' term.

"In 1843 Mr. T. L. Strange, as Civil Judge Tellicherry, held that the holder of a kulikanam lease forfeited his right to hold for twelve years by neglecting to plant trees in accordance with the terms of his contract" (*b*).

"In 1843, Mr. Waters, as Civil Judge Tellicherry, held that in the grant of a kulikanam lease, there was an implied consent on the part of the janmi to the tenants building a suitable house on the demised premises and a corresponding obligation to pay compensation. This decision was confirmed by the Sudder Court (*c*).

"The farm buildings erected by the tenant must be of a character suitable to the holding.

"In two appeals of 1877 the question arose whether a janmi was at liberty to relinquish a portion of the demised property on which an expensive house had been built, and I held that if not suitable to the holding and unreasonable, it might be excluded (*d*).

"The more common mode is for the janmi to ask that the buildings erected may be removed by the tenant. On the one hand, it is hard on the tenant to be left with a farm-house and buildings in the centre of paddy fields and cocoanut plantations in which he has no interest. On the other hand, it is hard on

(*a*) A. S. 327 of 1872, Sub-Court, Tellicherry.

(*b*) A. S. 3 of 1843, Civil Court, Tellicherry.

(*c*) A. S. 55 of 1843 (Tellicherry); S. A. 11 of 1847; Sudder Decisions, 1849, p. 62.

(*d*) A. S. 156 and 161 of 1877. District Court South Malabar.

the landlord to be improved out of his own land. It is the duty of the Courts to check capricious conduct on the part of either.

"In the case of a tenant whose demise has been renewed from time to time, the question frequently arises whether he is entitled to compensation for improvements made from his first entry or only from the date of the last renewal. Before the introduction of the twelve years' term, the custom was, when a renewal took place, to assess the improvements and add them to the kanam amount. If this was not done, it was usually recited in the new deed that the right to improvements was reserved. When the deed of renewal was silent on the subject of the adjustment of the tenant's claim, Mr. Holloway, as Sub-Judge of Calicut, held that, as there was a new contract, the presumption was that the tenant's claim was satisfied and observed as follows:

"'The renewal of a deed is not a continuation of an old contract, but the making of a new one, and it must be concluded that all rights accruing to the tenant under the former contract were then disposed of, otherwise, there could be no termination to suits of this nature. Reason, convenience and the principle of the law which forbids the varying of a contract reduced to writing by evidence of extrinsic matter, all point to the date of renewal as that from which improvements to be paid for on return are calculated. That is in fact, so far as a Court can appreciate it, the commencement of the tenancy' (*a*).

"On the other hand, the Sub-Judge of Tellicherry Mr. Krishna Menon, appears to have been of opinion that the presumption was that the tenant's claim was not satisfied.

"The matter has lately been before the High Court in Mupanagiri Narayana Nayar *v.* Virupatchan Nambudripad (*b*). The Judges (Innes and Muttusami Aiyar, JJ.) declined to follow Mr. Holloway's reasoning and referred an issue to me for trial as to the custom. I found that there was no fixed rule on the subject, but pointed out that, if in the renewal deed fixtures were spoken of as the property of the janmi, or if what was formerly a paramba had been converted into a palliyal and was so mentioned in the renewal deed, the tenant could not reason-

(*a*) Zillah Decisions, Calicut Sub-Court, October 1856, p. 2.

(*b*) I. L. R., IV Madras, 287.

ably claim compensation in the one case for the structure, or in the other case for the cost of conversion."

The decision finally arrived at by the High Court, in Mupanagiri Narayana Nayar *v.* Virupatchan Nambudripad (*a*), was that there was no universal usage in Malabar nor any presumption that a tenant was not entitled to compensation for improvements effected prior to the date of the kanam under which he held and not specially reserved to him by the kanam deed. In his finding, Mr. Wigram had pressed the High Court for a ruling on certain points, but the learned Judges, in a separate proceedings, printed as a note to their judgment, while expressing their inability to frame definite rules on the question raised, remarked as follows :—

"The fact of property being mentioned in the renewal as that of the janmi may be very strong evidence against a tenant's claim to adjustment of improvements upon it in a subsequent renewal, but it is not an estoppel, and if he saw fit to rebut the presumption against him by evidence, there is no reason why he should not give it."

In Narayana *v.* Narayana, the decision in Mupanagiri Narayana Nayar *v.* Virupatchan Nambudripad was referred to and approved and it was observed :—

"It was, we believe, the usage in Malabar that account should be taken of the improvements at the end of the term of the kanam, and that the value should be added to the kanam amount if it was not at once discharged by payment. This usage was most convenient, for it enabled the parties, within a reasonable time after they had been made, to determine what amount ought fairly to be allowed to the kanamdar for his labour and expenditure. The usage has, however, in course of time been greatly departed from, and in many instances, a renewal has been granted, leaving the account between the parties respecting the value of improvements still undetermined" (*b*).

The law on this question at present in force will be

(*a*) I. L. R., IV Madras, 287. (*b*) I. L. R., VIII Madras, 284.

found in Section 5, Act I of 1900, from the wording of which it would appear that the burden of proving that compensation has been paid for improvements found existing on the land is on the janmi.

Mr. Wigram in the first edition of this work further discussed the question of compensation for improvements as follows :—

"As to the rates payable for improvements, it is usual to depute a commissioner to assess the improvements according to the customary rates of the locality. So far back as 1854 it was suggested by Mr. Strange, in his report on the Mappilla outrages, that the revision of the rules which regulate the rates of reimbursement for improvements effected by tenants was desirable, and that the rate should be according to the actual value of the products planted by the tenants and not the nominal value fixed by usage, which is far below the actual value. But the Sudder Court advised the Government that it was a subject on which legislative interference was inexpedient" (*a*).

"The rates for fixtures and tillages do not vary to any considerable extent throughout the district. In assessing the former, it is usual to calculate the cost of the stones, timber and other materials used and of the labour employed, and allow a percentage for depreciation. In assessing the tillages, it is usual to calculate from three to six pies per kandi or cubic kol according to the nature of the soil.

"In the case of plantations, the customary rates exhibit marked variations. In the nothern part of Malabar and in the Calicut taluk of South Malabar, the highest rate for a cocoanut tree in full bearing is only eight annas. On the other hand in Chowghat, to the extreme south of South Malabar, the rate is as high as eight rupees. In other parts of South Malabar the rate varies, but the average rate is from four to five rupees.

"In 1878, I obtained official reports from all the Munsifs of South Malabar as to the customary rates prevailing in all the villages in their jurisdiction, and it is usual to adopt these rates as the standard of valuation.

(*a*) Sudder Proceedings dated 13th February 1854.

"In S. A. 30 of 1881 (District Court, South Malabar) the appellant took objection to the customary deduction of the janmi's half share as a hardship, but without success.

"It is impossible satisfactorily to account for the variations in rates. Sometimes there is a special rate for each amsam or parish. Sometimes the trees are valued at their full market value and a fixed percentage, one-half or one-third, is deducted as the janmi's share. A partial explanation may be discovered in the difference between the kanam of North Malabar and the kanam of South Malabar, which I have alluded to in my preliminary observations on the kanam. It may well be that, in the former case, the land was regarded as the property of the aristocracy and leased out to tenants, and that in the latter, the land was originally the property of the tenant who converted his rent service into a rent charge. In Chowghat, most of the lands were taken up on reclaiming leases after the landlord and tenant system had been firmly established. Possibly the rates have sometimes varied according as the local judge was an advocate of landlord or tenant right.

"It is usual to classify the trees according to their productive powers and their age, and even for tender plants which have not arrived at the fruit-bearing stage, some allowance is made.

"Without introducing a measure of confiscation, Legislation can do nothing in the way of assimilating the rates in various parts of the district for improvements already made. But for the future, the right of the tenant to the full market value of improvements effected by him, less perhaps a certain deduction for the unearned increment, might fairly be recognized and would tend to improve the agriculture of the Province. Perhaps a more feasible method would be to introduce a legislative enactment conferring fixity of tenure on the tenant under certain conditions."

In 1884, not very long after the above remarks had been recorded, the Government of Madras appointed a Committee to consider what measures should be taken to protect cultivators in Malabar from rack-renting and eviction. The proposals of this Committee were sent to the High Court for remarks with the result that they were so

severely criticised by Sir Charles Turner, the then Chief Justice of Madras, in the Minute to which allusion has been more than once made in the present edition of this work, that in 1885 a second Committee was appointed to reconsider the whole question. The conclusion arrived at by this Committee was that, if the question of compensation for improvements was adequately dealt with, no further interference on the part of Government between landlord and tenant in Malabar was required. The Government of Madras accepted this view and passed Act I of 1887 (Madras). It will, it is believed, be generally admitted that this Act was not clearly and skilfully drafted and there can be no question that the Courts found some of its sections most difficult to interpret in a satisfactory manner. For this and other reasons the Government in 1895 decided to amend the Act. After lengthened deliberation, a revised Bill was introduced into the Legislative Council in 1899. The objects that Government had in view in the proposed legislation cannot be better set forth than by quoting the following passage from the speech made in the Legislative Council by the introducer of the Bill :—

"The professed object of the enactment (*i.e.*, the Act of 1887) as described in the Report of the Committee was two-fold—

"(1) To secure to evicted tenants the full market value of their improvements.

"(2) By so doing to put what it was believed would be an adequate check on the growing practice of eviction. I will not weary the Council by quotations to prove that the intention of the Act was, in the words of Sir P. Hutchins, that 'the true measure of a tenant's improvements should be the difference between the present market value of the land in its improved condition and what would have been its present value if it had remained in its former condition.'

"Any Honorable Member who cares to refer to the Proceedings and Report of the Committee can verify the fact. I

will merely refer to the Minute by Sir T. Muttusami Aiyar to be found among the printed papers which have been furnished to the Council. He not only admits that the tenant was intended to get the full market value of his improvements, but advises that the Act should be amended so as to make it clear that, where the return, or profit, from an improvement is very remunerative, the janmi should not be permitted to participate in it on the plea that the profit was partly attributable to the fertility of the land. Well, the language of the Act gave room for diversities of construction. In some of the local Courts rates of compensation were introduced which give the evicted tenant only the value of one year's produce of fruit-trees, and in the case of other improvements the Courts measured the value of improvements by their cost to the tenant and awarded to the landlord the whole of the amount by which the capitalized value exceeded the cost value. In the case of every successful and profitable improvement, the landlord was thus tempted to evict and secure the profit of the improvement" (*a*).

The Bill, as amended after full discussion, was passed as Act I of 1900 which is as follows :—

MADRAS ACT NO. I OF 1900.

An Act to secure to Tenants in the Malabar District Compensation for Improvements.

Preamble.

WHEREAS it is expedient to amend the law relating to compensation for improvements made by tenants in the Malabar district ; It is hereby enacted as follows :—

Short title, and local extent.

1. This Act may be called the Malabar Compensation for Tenants' Improvements Act, 1899 and it shall be applicable to the whole of the Malabar district.

(*a*) Speech by the Hon'ble Mr. (now Sir) Henry Winterbotham in the Madras Legislative Council reported in the Supplement to the *Fort St. George Gazette* of the 14th February 1899.

Repeal of Act I of 1887.

2. Madras Act I of 1887 is hereby repealed.

Interpretation clause.

3. In this Act unless there is something repugnant in the subject or context—

Tenant.

(1) "Tenant," with its grammatical variations and cognate expressions, includes a person who as lessee, sub-lessee, mortgagee or sub-mortgagee, or in good faith believing himself to be lessee, sub-lessee, mortgagee or sub-mortgagee of land is in possession thereof, or who with the *bonâ fide* intention of attorning and paying the customary rent to the person entitled to cultivate or let waste land, but without the permission of such person, brings such land under cultivation and is in occupation thereof as cultivator.

Ejectment.

(2) "Ejectment" includes redemption or recovery of possession of land mortgaged.

Improvement.

(3) "Improvement" means any work or product of a work which adds to the value of the holding, is suitable to it and consistent with the purpose for which the holding was let, mortgaged, or occupied.

Commentary.

In Kunhammed *v.* Narayanan Mussad certain land was demised on kanam and it was provided in the document that the land should be irrigated for a certain number of hours a day and that rent should be paid in paddy. The demisee converted the land into a paramba which he planted with cocoanut and arecanut trees and it was held that the conversion of the land was inconsistent with the purpose for which it was let and compensation for the improvements made was allowed by the High Court, solely on the ground that the landlord had stood by while the character of the holding was being changed and had thereby caused a belief that the change had his approval (*a*). Under the provisions of the present Act it would

(*a*) I. L. R., XII Madras, 323.

appear that, if land is demised on kanam for agricultural purposes and the demisee converts a paddy land into a paramba cultivated with cocoa and areca nut trees, if the effect of the alteration be to increase the annual nett produce of the holding the demisee is entitled to compensation, calculated according to the amount of such increase as laid down in Section 9, but, if he has not by the alteration increased the value of the net produce, he is not entitled to any compensation on account of it. In Ravi Varmah *v.* Mathissen, where certain lands were demised to the members of a German Mission who erected a church and other buildings on it, compensation was refused for such buildings, including the church, as were unsuitable to the holding and inconsistent with the purpose for which it was let (*a*).

What are presumed to be improvements.

4. Until the contrary is shown the following works or the products of such works shall be presumed to be improvements for the purposes of this Act :—

(*a*) the erection of dwelling-houses, buildings appurtenant thereto, and farm buildings ;

(*b*) the construction of tanks, wells, channels, dams and other works for the storage or supply of water for agricultural or domestic purposes ;

(*c*) the preparation of land for irrigation :

(*d*) the conversion of one-crop into two-crop land ;

(*e*) the drainage, reclamation from rivers or other waters, or protection from floods, or from erosion or other damage by water, of land used for agricultural purposes, or of waste land which is culturable ;

(*f*) the reclamation, clearance, enclosure, or permanent improvement of land for agricultural purposes ;

(*g*) the renewal or reconstruction of any of the foregoing works, or alterations therein or additions thereto ;

(*a*) I. L. R., XII Madras, 323.

(*h*) the planting or protection and maintenance of fruit trees, timber trees, and other useful trees and plants.

Tenant entitled to compensation on ejectment.

5. (1) Every tenant shall on ejectment be entitled to compensation for improvements which have been made by him, his predecessor in interest, or by any person not in occupation at the time of the ejectment who derived title from either of them, and for which compensation has not already been paid; and every tenant to whom compensation is so due shall, notwithstanding the determination of the tenancy or the payment or tender of the mortgage-money (if any), be entitled to remain in possession until ejectment in execution of a decree or order of Court.

(2) A tenant so continuing in possession shall during such continuance hold as a tenant subject to the terms of his lease or of the mortgage, as the case may be.

Decree in ejectment to be conditional on payment of amount of compensation ascertained under this Act or the difference between it and the amount, if any, adjudged to the plaintiff from the defendant.

6. (1) In a suit for ejectment instituted against a tenant, in which the plaintiff succeeds and the defendant establishes a claim for compensation due under Section 5 for improvements, the Court shall ascertain, as provided in Sections 9 to 18, the amount of the compensation and shall pass a decree declaring the amount so found due and ordering that, on payment by the plaintiff into Court of the amount so found due and also the mortgage-money (if any), the defendant shall put the plaintiff into possession of the land with the improvements thereon.

(2) If in such suit the Court finds any sum of money due by the defendant to the plaintiff for rent or otherwise in respect of the tenancy, the Court shall set-off such sum against the sum found due under Sub-Section (1), and shall pass a decree declaring as the amount payable to him on

ejectment the amount (if any) remaining due to the defendant after such set-off.

Commentary.

With respect to the right here given to the janmi to set off arrears of rent due to him against the amount that he has to pay as compensation for improvements, reference may be made to the decisions in Achuta *v.* Kali (*a*), Eressa Menon *v.* Shamu Patter (*b*) and Vasudeva Shenoi *v.* Damodaram (*c*), all of which were decided before this Act was passed and also to the recent decision in Vedapuratti *v.* Avara (*d*). In the case last quoted the Sub-Judge of South Malabar, from whose decision a second appeal had been preferred, held as follows :—

"The question is whether the value of improvements due to under-tenants is liable to be set off against the arrears of rent due from the mortgagee to the mortgagor. No authority is cited in support of the contention that the amounts due for improvements belonging to a sub-tenant are liable to be set off against the arrears of rent due to the mortgagor from the mortgagee. It has been held that such set off is allowable when the improvements belong to a kanamdar (Achuta *v.* Kali (*a*) or a tenant (Eressa Menon *v.* Shamu Patter (*b*), but these rulings do not apply in a case where the improvements are not the property of the person who is liable to pay the rent. There is not a contract expressly or impliedly allowing a right to such set off and it would manifestly be unjust to charge the arrears of rent due by a mortgagee as against a third party who held the land on an independent simple lease granted by the mortgagee."

The Sub-Judge accordingly held that the amount due as compensation to the sub-tenants was not liable to be set off against the arrears of rent due from the kanamdar to the janmi, and modified the decree so that it stood in its original form.

It eventually did not become necessary for the High Court (Benson and Boddam, JJ.) to decide the question as to

(*a*) I. L. R., VII Madras, 545.
(*b*) I. L. R., XXI Madras, 138.
(*c*) I. L. R., XXIII Madras, 86.
(*d*) I. L. R., XXV Madras, 568.

the liability of the improvements made by sub-tenants for rent due by the kanamdar to the janmi. They, however, observed that they were much inclined to doubt the correctness of the view taken by the Subordinate Judge that they were not liable. His decision seemed to them to be *primâ facie* opposed to the principle of the cases quoted by him, *viz.*, Achuta *v.* Kali (*a*) and Eressa Menon *v.* Shamu Patter (*b*)

Under the rule of law contained in this sub-section it appears that the janmi would be entitled to deduct from the amount that he has to pay as compensation all rent due to him by his kanamdar or tenant irrespective of the nature of the tenure. Where, however, any of the persons entitled to compensation are sub-tenants under the kanamdar or assignees of any of his rights it would no doubt be necessary for the janmi to join them as defendants in the suit, if he wished to set off against compensation to be paid to them rent due by the kanamdar.

Compensation for subsequent improvements and re-valuation, if necessary, of improvements at the time of ejectment.

(3) The amount of compensation for improvements made subsequent to the date up to which compensation for improvements has been adjudged in the decree, and the re-valuation of an improvement for which compensation has been so adjudged, when and in so far as such re-valuation may be necessary with reference to the condition of such improvement at the time of ejectment, as well as any sum of money accruing due to the plaintiff subsequent to the said date for rent or otherwise in respect of the tenancy, shall be determined by order of the Court executing the decree and the decree shall be varied in accordance with such order.

(4) Every matter arising under Sub-Section (3) shall be deemed to be a question relating to the execution of a decree within the meaning of clause (*c*) of Section 244 of the Code of Civil Procedure.

(*a*) I. L. R., VII Madras, 545.
(*b*) I. L. R., XXI Madras, 138.

7. Whenever a Court passes a decree or order for ejectment against a tenant and such tenant has erected any building, constructed any work or planted any tree which the Court finds is not an improvement for which compensation can be claimed, but which the Court finds can be removed without substantial injury to the holding, such tenant may remove such building, work or tree within a time to be fixed by the Court in its decree or order.

Tenant may remove buildings, works or trees not deemed improvements, within a time to be fixed.

8. The Local Government may, from time to time, by notification in the Fort St. George and Malabar District Gazettes, make rules requiring the Court to associate with itself, for the purpose of estimating the compensation to be awarded under Section 6 for an improvement, such number of assessors as the Local Government thinks fit, determining the qualifications of those assessors, the mode of selecting them, the fee payable to them, and the procedure to be followed in case of a difference of opinion between the judge and one or more of such assessors.

Power to make rules for appointment of assessors, etc.

9. (1) When the improvement is not an improvement to which Section 13 applies and has caused an increase in the value of the annual nett produce of the holding, the Court shall determine, as nearly as may be, the average nett money value of such increase and the number of years during which such increase may reasonably be expected to continue, and shall then ascertain the present value, at 6 per cent. of an annuity equal to such money value for such number of years, and also the cost of making the improvement determined in the manner prescribed in Section 11.

Improvement producingan increase in the value of the annual nett produce.

(2) If the present value of the annuity does not exceed the cost of making the improvement, the present value shall be the compensation to be awarded.

(3) If the present value of the annuity exceeds the cost of making the improvement, the compensation to be awarded shall be the cost together with one-half of the excess.

Eplanation.—The value of the nett produce means the amount remaining after deducting from the value of the gross produce the cost of cultivation and the Government assessment and cesses.

Improvement consisting of trees or plants spontaneously grown during tenancy or sown or planted by tenants.

10. When the improvement is not an improvement to which Section 9 applies, but consists of timber trees, or of other useful trees or plants spontaneously grown during the period of the tenancy or sown or planted by any of the persons mentioned in Section 5, the compensation to be awarded shall be three-fourths of the sum which the trees or plants might reasonably be expected to realize, if sold by public auction to be cut and carried away.

Commentary.

In a recent case, Vasudevan Nambudripad *v.* Valia Chathu Achan, where the question for decision was as to whether a kanamdar during the period of his occupation was entitled to remove and appropriate to himself any trees that he had himself planted, this section was alluded to and it was argued from it that the Legislature recognised the landlord's interests in trees grown by a tenant to the extent of one-fourth of their value. The High Court (Davies, Benson and Boddam, JJ.), however, did not accept this argument holding as follows :—

"We think the deduction is made rather on account of the compulsory nature of the law which obliges the landlord to pay for the improvement whether he wants it or not. This seems clear from the fact that Section 7 of the same Act provides that, when a tenant is ejected who has erected any building or planted any tree which the Court finds is not an improvement for which he can claim compensation (owing, for instance, to its being unsuitable to the holding), but which can be removed without substantial injury to the holding, he may remove the tree or building within a time to be fixed by the

Court. If, then, a tenant is allowed, even after the expiry of his tenancy, to remove a tree or building which is not an improvement, it would seem to be unreasonable to forbid him to remove it during his tenancy. The law treats such tree or building as the property of the tenant, and it is not the less his property because it is of such a kind that he can require the landlord to pay him compensation for it if it be left for the landlord's benefit. It may well happen that a tree planted by a tenant may arrive at maturity and be fit for the market before the expiry of the kanam tenancy. In such a case it would surely be unreasonable to hold that the tenant should be forbidden to utilise his tree, but should be obliged to allow it to deteriorate until the end of his tenancy and then claim compensation for it from the landlord. Whether, then, we have regard to the views of the Local Legislature with respect to tenant's improvements in Malabar, or whether we consider the matter on the broad ground of principle, we are of opinion that the first question referred to us should be answered in the affirmative and that a kanamdar during the period of his occupation is entitled to remove and appropriate to himself any trees that he has himself planted, provided that he leaves the property substantially in the state in which he received it" (*a*).

Other kinds of improvements.

11. When the improvement is not an improvement to which Section 9 or 10 applies the compensation to be awarded shall be the cost of the labour including supervision thereof, and of the materials together with other expenditure, if any, which would at the time of the valuation be required to make the improvement, less a reasonable deduction on account of the deterioration, if any, which may have taken place from age or other cause.

Value of improvement to be ascertained in the way most favourable to the tenant.

12. Notwithstanding anything contained in Sections 9, 10 and 11, the amount of compensation to be awarded for an improvement shall be ascertained in the way prescribed by any of the said sections which is most favourable to the tenant.

(*a*) I. L. R., XXIV Madras, 47.

Illustrations.

(*a*) The compensation to be awarded for a jack tree as a fruit tree is ascertained under Section 9 to be Rs. seven, but for the same tree as a timber tree it is ascertained under Section 10 to be Rs. ten.

(*b*) The compensation to be awarded for an immature casuarina plantation is ascertained under Section 10 to be Rs. twenty, but under Section 11 to be Rs. one hundred.

In each case, the Court shall award the higher amount.

Improvement consisting in the protection and maintenance of trees and plants not sown or planted by tenants and of trees and plants spontaneously grown prior to tenancy.

13. When the improvement consists in the protection and maintenance of timber or fruit trees, or of other useful trees or plants not sown or planted by any of the persons mentioned in Section 5, or of such trees or plants spontaneously grown prior to the commencement of the tenancy, the compensation to be awarded shall be the proper cost of such protection and maintenance ascertained as provided in Section 11.

Power to frame tables of maximum and minimum rates of compensation.

14. The Local Government may prepare for the whole or any part of the Malabar district tables showing the maximum and the minimum rates of compensation to be awarded under this Act for all or any class of improvements, and when such tables have been published the amount awarded as compensation under Sections 9, 10, 11 and 12 shall not, except where the Court is satisfied that there has been exceptional care, skill or enterprise on the part of the tenant, exceed such maximum rates, nor shall it in any case be less than such minimum rates.

Power to prepare tables of prices of products, the cost of cultivating paddy, planting, protecting and maintaining trees and plants.

15. (1) For the purpose of determining the amount of compensation to be awarded under this Act, the Local Government may prepare tables for the whole or any part of the Malabar district showing all or any of the following matters :—

(*a*) The price of cocoanuts, arecanuts, pepper and paddy.

(*b*) The cost of—

(i) cultivating and harvesting a crop of paddy;

(ii) planting, protecting and maintaining a cocoanut tree, an arecanut tree, a jack tree and a pepper vine until the tree or vine is in bearing;

(iii) protecting and maintaining a cocoanut tree, an arecanut tree, a jack tree and a pepper vine for one year when in bearing.

Such tables to be presumptive evidence that the prices and costs therein mentioned are correct.

(2) The tables prepared under this section shall, on publication, be receivable in evidence and the rates and amounts therein specified shall be presumed to be the proper rates and amounts until the contrary is proved; provided that in so far as such tables prescribe prices of products, the presumption shall not be rebuttable except by proof of the average price as provided in Section 16.

Value to be ascertained where no table has been perpared or the correctness of the price mentioned in the table is disputed.

16. In respect of any product for which no table showing the price has been published, and whenever the presumption under Section 15 as to price is sought to be rebutted, the Court shall adopt as the money value for the purpose of awarding compensation under Section 9, the average price as nearly as may be ascertainable, in the taluk where the land is situated, for a period of ten years immediately preceding the institution of the suit.

Tables to be published.

17. The tables prepared under this Act shall be published in English and Malayalam in the Fort St. George and Malabar District Gazettes, and shall be kept publicly posted in the Courts having jurisdiction over the area to which the tables apply.

The Local Government may, by like publication, cancel or vary from time to time the tables so published.

Compensation may be refused where trees have been overplanted.

18. When trees are planted in excess of the following scale, the Court, if satisfied that, in the circumstances of the particular case the land is overplanted, may, notwithstanding anything hereinbefore contained, either refuse to grant any compensation, or may grant compensation at a lower rate, for so many of the trees as are in excess of the scale and are immature :—

Cocoanut trees	...	...	... 120	per acre.
Arecanut trees	...	...	... 720	,,
Jack trees	...	...	... 60	,,

In the case of a mixed garden each tree shall be allowed a proportionate fraction of an acre according to the above scale.

Contract affecting tenant's right to make improvements and claim compensation under the Act invalid.

19. Nothing in any contract made after the 1st day of January 1886 shall take away or limit the right of a tenant to make improvements and to claim compensation for them in accordance with the provisions of this Act.

Proviso.

Provided that nothing herein contained shall affect any agreement in writing registered made after the effecting of the improvements settling the amount of compensation due therefor at the date of such agreement.

Commentary.

Under Section 7 of the Act of 1887, which corresponds with this section, it was held by the High Court, in Uthunganakath Avuthula *v.* Thuzhatharayil Kunhali, that an agreement under which a tenant undertook not to demand compensation for improvement made by his father prior to the agreement was invalid (*a*). The proviso to this section is, however, new and it appears that under it the parties can by a registered document settle the amount that is to be paid on account of improvements made prior to the agreement and also, it is

(*a*) I. L. R., XX Madras, 435.

presumed, agree, that no compensation is to be paid on account of such improvements.

Saving clause.

20. Nothing in this Act shall be construed as taking away the right of any person who may be entitled by law or custom to claim compensation for any improvements other than those dealt with under the provisions of this Act.

It will be remarked that there have been very few decisions of the High Court as yet on questions arising out of this Act.

Some years back it was usual to reserve the valuation of improvements to be made when the decree was being executed, the reason for doing so being that, when once the improvements had been assessed, the tenants had, in some instances, destroyed them to the injury of the janmis. The High Court has, however, found it necessary to insist on the value of improvements being ascertained before a final decree is passed, observing as follows in a case which came before a Full Bench :—

"The Subordinate Judge has, with improper disregard of the repeated orders of the High Court, reserved the inquiry into improvements to the execution of the decree. There can be no complete decree until these matters are ascertained, and neither with, nor without, the consent of parties can they be reserved for execution" (*a*).

Difficult questions may arise where a kanamdar before relinquishing the land transfers his right to compensation from the janmi for improvements to a third party. In Achuta *v.* Kali, where this occurred, it was held by the High Court (Hutchins and Brandt, JJ.) that a pledge of his rights to a third party by the kanam-holder will not prejudice the right of the janmi to set off his claim for arrears of rent against the sum found due to the kanam-holder for improvements. The Judges observed :—

"The janmi has obtained the usual decree for eviction of

(*a*) Nellaya Vaniyath Silapani *v.* Vada Kipat Manakel Ashtamurti Nambudri, I. L. R., III Madras, 382, F. B.

the kanamdars on payment of the kanam amount and compensation for improvements less three years' rent due in arrears. It is admitted that a janmi can set off arrears of rent against the kanam amount, but it is contended that he has no right to set off his rent against the improvements where such improvements have been hypothecated to a creditor of the kanamdar.

"It seems to us that the creditor can only go against the nett amount found due by the janmi. The appellant claims under kanamdars whose tenure is liable to periodical adjustments, and who could not create any right not subject to the same adjustments. At each adjustment, the kanamdar has a right either to a renewal or to be paid his kanam amount and compensation for improvements less the rent, if any, which may be due by him in arrears. We see no difference in this respect between the kanam amount and the improvements. Indeed, it was admitted, and is well known, that the value of improvements is often included at a renewal in the new kanam amount, and, if this were done, it is conceded that the janmi would have the right of set-off.

"A kanamdar can pledge all his rights or he can pledge the nett sum which may become payable to him at adjustment; but he cannot, it seems to us, say that the compensation is ever payable to him apart from a general settlement, nor can he give a separate title to it as against his landlord. Regarded as a debt, the claim to compensation is a mere inchoate right which only becomes perfected at the eviction and subject to its customary incidents, and if we regard the appellant as a mortgagee of the actual trees or buildings constituting the improvements, his possession is no better. The janmi has a right to these upon payment of any sum which may be found due at the adjustment. The appellant cannot be in a better position as a mere creditor than he would be after foreclosure, and, if he had foreclosed, he would himself have become the kanamdar. The right of the set-off as against the kanamdar is not disputed" (*a*).

The principle laid down in this judgment was followed in Eressa Menon *v.* Shamu Patter (*b*), where the person

(*a*) I. L. R. VII Madras, 545. (*b*) I. L. R., XXI Madras, 138.

entitled to compensition for improvements was a tenant under a verumpattam, and also in a recent case, Vasudeva Shenoi *v.* Damodaran, where the Judges (Subramania Ayyar and Moore, JJ.) held as follows :—

"The right of a tenant to compensation in Malabar is, as pointed out in Achuta *v.* Kali (*a*), of a somewhat peculiar character. It is dependent on the state of the account between the tenant and the landlord as to the claims which the latter has against the former at the time the question of compensation comes to be settled, on account of rent or other dues payable under the demise by which the tenancy was created. The right to such compensation cannot properly be compared to a tenant's right to fixtures.

"The right in question, it seems to us, may be treated as possessing more analogy to the right to a chose-in-action, and a transfer of such a right by a tenant to a third party cannot possibly affect the landlord, unless he has notice of the transfer, when he accepts the surrender of the property demised and settles the account with the tenant in reference to arrears of rent, etc., on the one hand, and the amount of compensation on the other, and enters into an adjustment of the respective claims. In the present case no attempt was made to show that the landlord had notice. It is therefore unnecessary to consider whether, if he had had notice, that would have affected his right to set-off the arrears of rent due to him against the amount payable as compensation" (*b*).

Reference may also be made to Vedapuratti *v.* Avara (*c*) and to Section 6, Act I of 1900 (Madras) and the notes appended to that section.

(*a*) I. L. R, VII Madras, 545. (*b*) I. L. R., XXIII Madras, 86.
(*c*) I. L. R., XXV Madras, 568.

CHAPTER XII.

COWLES.

According to the Revenue system prevailing in Malabar any person is at liberty to apply to the Government for permission to occupy waste land and, if his application is accepted, he is granted what is termed a cowle for the land that he is desirous of occupying and cultivating. The cowle, however, merely confers a right to hold the land free from the payment of Government tax for a term of years. It confers no title as against the janmi who is at liberty to eject the cowle holder or squatter on payment of the value of the improvements effected by him.

The question as to how far, if at all, the rights of the janmi over the land could be affected by the sale of it under the provisions of Act II of 1864 (Madras) on account of arrears due by the occupying tenant has been the subject of considerable discussion. In the Zamorin of Calicut *v.* Sitarama, the janmi had leased some land to a tenant who had received a patta from Government for the extent of his holding. The tenant allowed the revenue due on the land to fall into arrears and it was accordingly sold under the provisions of Act II of 1864. The question that came before the High Court for decision in second appeal was as to whether by this sale the interest of the janmi passed to the purchaser. The Judges (Turner, C. J. and Muttusami Aiyar, J.) answered this question in the affirmative, notwithstanding that it had been found that no written demand had been served on the landlord as required by the Act. They observed as follows:—

"The material question is whether, when the patta stands in the name of a tenant, service upon him of the written demand mentioned in Section 38 is sufficient service on the

proprietor. By suffering the registry to stand in the tenant's name, the proprietor puts him forward as the ostensible owner and, as between him and the Government, the service upon such tenant must be taken to be, in law, service upon the real owner. He cannot complain that the Government is in error in serving the written demand on the person whom he permitted to appear as the ostensible landowner" (*a*).

Not long after this decison had been passed, Sir Charles Turner, while writing his Minute on Malabar Land Tenures, saw reason to doubt its correctness, as will be seen from the following quotation :—

"There has been great confusion in Malabar respecting the registration of the revenue payers. The recognition by the Revenue authorities of persons other than the janmi as liable directly to the Government for revenue, has enabled persons who have no real title to the janmam to set up false claims on the strength of the receipts in their possession. Not long ago, I held that the right of a janmi passed on a revenue sale, because he had suffered his tenant to be registered as the revenue payer. I fear that I did injustice from ignorance of the extent to which the Revenue authorities in Malabar have diverged from the practice in other parts of India. It is clear that, whatever arrangement the parties may make as between themselves respecting the payment of the revenue, the janmi should be regarded as the person primarily liable and so registered" (*b*).

The whole question was subsequently very fully considered by the High Court, in The Secretary of State *v.* Ashtamurthi. In that case the Collector of Malabar had put a cultivator in possession of certain land under a cowle, subsequently granting him a patta. The cowledar allowed the revenue to fall into arrears and the land was accordingly sold under the provisions of Act II of 1864. The janmi had no notice either of the cowle or of the patta. At the time of the sale under the Revenue Recovery Act, he, by petition, asserted his right, and when the

(*a*) I. L. R., VII Madras, 405.
(*b*) Sir Charles Turner's Minute on Malabar Land Tenures, p. 96.

sale was allowed to proceed without reference to his claim, brought a suit to set it aside. The High Court, at the end of a protracted discussion, held that the interest of the janmi did not pass by the sale. The judgments of the learned Judges (Parker and Shephard, JJ.) who tried the case are important, inasmuch as they deal not merely with the actual question at issue in the case, but also contain valuable observations as to the relative rights of Government and the janmis in Malabar and throw much light on the actual position of the latter as proprietors of the soil. Mr Justice Parker, in the opening portion of his judgment, observes as follows :—

"It is admitted that the land in Malabar is private property, but it is argued on behalf of Government that, co-existent with the proprietorship of the janmi, is the right of Government to allot to any person, not the proprietor of the soil, the right to cultivate any waste land in the janmi's estate which is capable of cultivation, but which the janmi has not cultivated. This right, it is asserted, is founded upon the right of the State to derive a revenue from all land cultivated or capable of cultivation, and it is contended that a private proprietor has no right to keep any portion of his estate waste if, in the opinion of the officers of Government, it should be cultivated so as to yield revenue to the State, and, that if he neglects to cultivate such waste, the Collector may, without reference to him, assign such land for cultivation to any other person, subject however to the janmi's right to eject such person and pay the revenue himself.

"Such claim is no doubt altogether inconsistent with rights of property as understood by English Law, but it has been held that property in the soil must not be understood to convey the same rights in India as in England. 'It may be 'subject to restrictions and qualifications varying according to 'the peculiar laws of each country; and those acts which 'under one system, would be necessarily regarded as con- 'tradictions of any ownership over the object on which they 'were exercised, except that from which they spring, might, 'under another system, be quite compatible with an ownership 'subsisting unimpaired side by side with the limited right to

'which they would be attributed. The exaction of a share of 'the crops is itself an instance of this divided dominion (*a*). The right here claimed however is something much larger than a right to a share in the crops. It is not alleged that the right now claimed rests either upon legislative enactment or upon judicial decision, but it is said to be founded upon customary law which has not hitherto received the sanction of judicial recognition. It is necessary therefore that a custom of an anomalous character and apparently so subversive of the ordinary rights of private property should be strictly proved before it can be recognised as having the legal requisites of a valid custom.

"The evidence shows that the janmis, or the proprietors of the soil in Malabar, have long been in the habit of leasing out the greater portion of their estates to kanamdars who are thus in the immediate occupancy of the greater part of the soil. This was the state of things at the time of Hyder's conquest and the British Government is stated to have continued the practice of the Mysore Government in settling the assessment with these kanamdars. At the annexation of Malabar in 1799 the Government disclaimed any desire to act as the proprietor of the soil, and directed that rent should be collected from the immediate cultivators, (*vide* Trimbak Ranu *v*. Nana Bhavani (*b*) and the Secretary of State *v*. Vira Rayan (*c*),) thus limiting its claim to revenue. Further, in their despatch of 17th December 1813, relating to the settlement of Malabar, the Directors observed that in Malabar they had no property in the land to confer, with the exception of some forfeited estates. This may be regarded as an absolute disclaimer by the Government of the day of any proprietary right in the janmis' estates, and is hardly consistent with the right of letting in a tenant which is certainly an exercise of proprietary right."

(*a*) Baskarappa *v*. The Collector of North Canara, I. L. R., III Bombay. 452, at pp. 715, 716.

(*b*) XII Bombay H. C., 144.

(*c*) I. L. R., IX Madras, 175. This is the well-known Attapadi Valley case and the following passage from the judgment (Turner, C. J., and Muttusami Aiyar, J.) in it is worthy of note with respect to the question of the rights of Government to forests or waste lands in Malabar:—

"At the commencement of the century it was the policy of the Govern-

Mr. Justice Shephard deals with the whole question of the rights of the janmi as proprietor of the soil as follows :—

"Coming to the main question which is, as far as I can learn, discussed now for the first time in a Court of Justice, we have to consider what authority there is for the proposition asserted on behalf of Government that the jenm title of land can be sold under the Act in satisfaction of arrears of revenue due by a pattadar, who has occupied the land without the janmi's consent.

"There is no doubt that the practice of granting cowles to persons who undertake to cultivate waste lands has largely prevailed in Malabar. The practice is consistent with the anomalous system, which has also long prevailed there of

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ment to allow all lands to become private estates where that was possible. (*vide* Despatch of Lord Wellesley quoted in Bhaskarappa *v.* The Collector of North Canara.) The despatch and order of the Governor-General in Council on the annexation of Malabar, dated the 31st December 1799 and the 18th June 1801, have not been adduced, but their purport appears from the despatch of the 19th July 1804, quoted in Vyakunta Bapuji *v.* The Government of Bombay (12 Bom., Ap. 1). It was intimated that it never could be desirable that the Government itself should act as the proprietor of the lands and should collect the rents from the immediate cultivators of the soil. When in 1808 the Board of Revenue suggested that an augmentation of revenue might be derived from waste lands reserved, they were informed that the Government did not look to any advantage of that nature beyond the benefit of increasing the amount of the public taxes in proportion to the existing taxes of the country (Fifth Report, Appendix 30, p. 902. Revenue and Judicial Selection, Vol. I., p. 842). It will be seen that at that time the Government, so far from abrogating the Hindu law, intended to assert no proprietary right to the waste, but limited itself to its claim to revenue. At the time Malabar came under British rule, all the forests were claimed as private property (I. L. R., III Bombay, 452, at p. 586). In their despatch of the 17th December 1813, relating to the settlement of Malabar, the Directors observed that in Malabar they had no property in the land to confer, with the exception of some forfeited estates (Revenue Selection, Vol. I., p. 511). Although a different policy was subsequently pursued in other districts, and, especially in more modern times, rules have been framed for the sale of waste lands, there is nothing to show that any such change was notified in Malabar up to a period much later than that at which there is considerable evidence to show that the respondents were in possession of and recognised as proprietors of the lands they claim by Government officials."

settling the revenue with the tenant and not with the janmi. The grantee of the cowle comes under an engagement with Government to pay revenue on the expiration of a fixed period during which the land is declared free of assessment. The relation in which the cowledar stands to the janmi is tolerably well ascertained. It is expressly provided in the cowle that the janmi's rights are unaffected by it, and it appears from the evidence that generally persons taking cowles at the same time make their terms with the janmi and, in the rules for granting remission on waste lands published in 1846, the advisability of adopting this course is pointed out to applicants for remission. Should the cowledar omit to make arrangements with the janmi, it is quite clear that, subject only to his right to compensation for improvements, he may be at once evicted. Should he, however, be left in possession for more than twelve years, without any recognition of the janmi's right, he would like any other trespasser acquire a valid title by limitation By the mere fact of a cowle being given and taken no benefit accrues to the grantee in his relations to the janmi, and conversely the janmi is in no way prejudiced. The question at issue is, in what manner the granting of the cowle affects the relations between the janmi and the Government.

"It is argued that the Government are within their right in planting a cultivator in a janmi's land without consulting him, and further that they are entitled to treat that cultivator as the landholder, ignoring the person who is admittedly the real owner. It is said that the power is necessarily involved in the right which Government possesses to charge revenue upon all cultivable lands, and it is urged that the janmi is not injured, because he is at liberty at any time to eject the cultivator and take upon himself the burden of paying the revenue. It appears to me that, in order to disprove the existence and even the utility of the power which is claimed, it is almost sufficient to state the position in which the cultivator is placed with regard to the janmi who has been ignored. If it is true that the cultivator may be ejected by the janmi the day after the Collector has let him into possession, it is difficult to understand in what sense the Collector had a legal right to admit

him upon the land. In so far as the object which the Collector has in view is a fiscal one, the obvious way of attaining it is by a direct application to the janmi and an intimation that he will be charged revenue for his waste land ; in so far as the object is to promote the cultivation of waste lands, that object is not very effectively furthered by a system under which the cultivator is left wholly at the mercy of the janmi. *A priori* it is most improbable that, in a country where the right of private property in land was highly developed and where it is not even certain that any land revenue was exacted by the ruling authorities before the Musalman invasion, a power so seriously trenching on proprietary right should have come into existence. Nor am I able to find, in the exhibits and other papers to which we have been referred, any foundation for the notion that Government has the asserted right. In all the papers, from the proclamation of 1799 down to the most recent, it is stated, or at least implied, that the janmi is to be consulted before a cultivator is put upon his land. In the proclamation the rights of Government are put on the highest ground and a security of tenure is assured to the cultivator which, in fact, he has not obtained. Yet even then the authorities evidently did not intend that the option of cultivating their lands should be taken away from the janmis altogether. In 1829 the Collector, in answer to questions put by the Board of Revenue, citing Major Walker as his authority, asserts to the full extent the right of the janmi to dispossess a cultivator who has been placed on the land in his absence. The only liability which the latter can incur for such unauthorized cultivation of the land is the liability to pay compensation for improvements. The Collector, Mr. Conolly, speaking of the right of Government to insist on cultivation of land in the interest of the revenue, distinctly saves the rights of the janmi, saying that, if he will not cultivate, Government is at liberty to get some one who will, reserving always to the landlord the share of the produce to which he is entitled and again in the same year similar language is used by the same Collector—'Proprietors 'are of course to have the choice of reclaiming such lands them-'selves, but should they refuse to do so on insufficient grounds 'the Government will take the offer of any other party who 'comes forward.' Our attention was specially called to the

order of 1850, also proceeding from Mr. Conolly, which the Collector, examined as a witness, quotes as the authority for prohibiting Revenue Officer from making inquiries as to who is the janmi when a cowle is to be granted.

"The Collector appears to have misunderstood the order, for all that it says is that it is unnecessary to record the names of janmis in the lists of waste lands since the Government gains nothing by such record. Anyhow, this order must not be read by itself, but in connection with the language used by Mr. Conolly on other occasions, and so read it affords no ground for belief that in his opinion the janmi and his rights might be ignored in the transaction altogether. No doubt he assumed that applicants for cowles would look after their own interests and secure themselves by making a bargain with the janmi, as he had recommended them to do in the hookumnamah published four years before. Some stress was laid upon the large number of cowles said to have been granted since 1826. In view of the circumstance above referred to, that in the majority of cases the cowledar at the same time enters into an engagement with the janmi, the prevalence of the system of granting cowles seems to me of no weight. Assuming that the Government have the right, claimed by Mr. Conolly in some of the above-cited papers, of introducing a cultivator on to the land of a janmi who unreasonably refuses to cultivate it, I can find no authority for the further claim which is now made of cultivating lands for a janmi without giving him the option of doing it himself. This claim appears to me to be an unwarrantable extension of the practice, which is itself an anomaly, of settling with the tenant and not with the janmi.

"The rights of the janmi are certainly not less extensive than those of the mirasidar with which they have often been compared. Yet the mirasidar is generally entitled to a prior right to undertake the cultivation and consequent assessment, and he does not lose any prescriptive rights he may have by the fact that patta is given to another (Subbaraya *v.* The Sub-Collector of Chingleput (*a*)). If we are to adopt the view contended for on behalf of Government the janmi is placed in a less favourable position, for the cultivation of his waste lands may be taken

(*a*) I. L. R., VI Madras, 303.

out of his hands without any choice being allowed to him in the matter, and he may run the risk of having his jenm right sold, without any warning or even notice that the land has been assessed.

" It was argued that it was the businesss of landholders to see that their lands were registered in their own names and that they can protect themselves by requiring the Collector so to register them, (Ponnusamy Tevar *v.* Collector of Madura (*a*)) and that on the other hand it was not the business of the Collector to ascertain who was the real owner and to settle with him. Reference was in this connection made to Section 35 of the Revenue Recovery Act, as showing that the legislature contemplated cases in which other persons than the registered holder might have interest in the land Notwithstanding the opinion expressed by Turner, C. J., in Subbaraya *v.* The Sub-Collector of Chingleput (*b*), I think it must be allowed that a suit would lie to compel the Collector to settle the assessment with the real owner and not with a third person (Mahomed Israile *v.* Wise (*c*)). And in my opinion the possession of such a remedy by the janmi is only consistent with his contention in this appeal. So far from that circumstance militating against the janmi's contention, it appears to me that, if he had no remedy in the case supposed, there would have been more reason for saying that the Collector in making a settlement might act without regard to claims of legal ownership. The Advocate-General referred to the Madras Regulations XXV and XXVI of 1802 as showing that it is the business of landholders to enter their names in the registry. The provisions for the registration of landholders were enacted for fiscal purposes. The Regulation XXV of 1802 requires that any alienation of part of an entire zamindari shall be registered, or the entire zamindari will still remain answerable for the whole revenue. In other words, a Zamindar who has come under an engagement to pay a certain revenue on account of a certain estate which stands as security therefor cannot lessen his obligation or diminish the security except with the consent of the Collector. But a provision of this

(*a*) III Madras H. C., 35. (*b*) I. L. R., VI Madras, 303.
(*c*) XIII B. L. R., 118.

sort is very different from one entailing on the landholder who omits to register the consequence that the Collector may treat another person as the landholder. There is no provision to that effect in the Regulations or in the Act of 1864."

* * * * *

"It was admitted that the right claimed on behalf of Government had not been recognized by the legislature and that no sanction for it was to be found in the Regulations of 1802 or in the Act of 1864. Unless Innes, J., was wrong in his opinion that the Act of 1864 provides a complete scheme for the realization of land revenue, that admission is fatal to the appellant's case; and, at any rate, in view of the large measure of attention and discussion which the institutions of Malabar have attracted from 1799 downward, the admission is of great importance. In my judgment the right of Government to deal with a stranger for the purpose of assessing the revenue as if he were the proprietor is not only not recognized by the legislature, but is inconsistent with the provisions enacted by it. In the Act II of 1864, as in the Regulation XXVIII of 1802, it is the landholder against whom measures are to be taken for realization of the revenue. It is the landholder between whom and the Collector the engagement with regard to revenue shall be made. He, being the person who may be a defaulter, is the person whose property, movable or immovable, may be sold under the provisions of Section 6, and he is the person to whom notice has to be given under Sections 8 and 25 before the Collector proceeds to sell the property. It is quite true, as was insisted in the argument, that the land is security for the revenue, but a security pre-supposes an obligation, and unless therefore an obligation has been imposed on the landholder, it is difficult to see how his interest in the land can be affected. 'The right of the Government is only a right to a charge 'on the land and a right to forfeit by due course of law the 'title of the person holding the land who does not pay the 'charge.' (Subbaraya *v.* The Sub-Collector of Chingleput (*a*).) The case for Government requires that the pattadar who, as already observed, is as against the janmi a mere trespasser,

(*a*) I. L. R., VI Madras, 303.

should be identified with the janmi so that his engagement should be treated as an engagement entered into by the janmi. It is intelligible that such an identity should be taken to exist in the case where the landholder allows a third person to represent himself as owner of the land (see Zamorin of Calicut *v.* Sitarama (*a*). As to this case however compare Minute on Malabar Tenures by Turner, C. J., p. 96). But I fail to see on what principle it can be held that a janmi on whose land a stranger has intruded behind his back can be taken to have assumed any responsibility for the revenue and therewith to have pledged his land as security for the due payment of it. If the contention on behalf of the Government is to be accepted and the janmi is supposed to have assumed any responsibility, it must follow that the Collector is equally at liberty to realize the arrears of revenue by the sale of other immovable property or movable property belonging to him. I must not omit to notice the provision of Section 42 of the Act, on which some stress was laid, to the effect that land brought to sale for arrears of revenue shall be sold free of all incumbrances. In my judgment it would be a strain on the language of the section to hold that the phrase 'incumbrances,' which ordinarily denotes a burden imposed on land by the owner, is intended to denote the interest of the owner himself" (*b*).

The questions at issue in this case may be said to have been settled by these judgments and the Legislature has, since they were pronounced, modified the revenue system of Malabar so as to bring it into accordance with the law as laid down in them (*c*).

It has recently been held by the High Court, in Muniappan Chetty *v.* Mannarkat Muppil Nayar, that, if a cowledar is left in possession for more than twelve years without any recognition of the janmi's right, he acquires a valid title by prescription. The Judges (Davies and Benson, JJ.) observe :—

"The effect of the grant of a cowle *quoad* the janmi has often formed the subject of judicial decision, and is well laid

(*a*) I. L. R., VII Madras, 405.

(*b*) I. L. R., XIII Madras, 89.

(*c*) *Vide* Act III of 1896 (Madras) printed in the Appendix.

down in the case of The Secretary of State *v.* Ashtamurthi (*a*). It is expressly provided in the cowle that the janmi's rights are not affected by the grant of the cowle, and it is usual for the holder of the cowle to settle with the janmi at the same time when he receives the cowle from Government. The cowle merely insures a favourable assessment of the Government dues on cultivation. Should the holder of a cowle fail to settle with the janmi, he may be evicted. Should he, however, be left in possession for more than twelve years without any recognition of the janmi right, he would, like any other trespasser, acquire a valid title by prescription" (*b*).

(*a*) I. L. R., XIII Madras, 89.

(*b*) Madras Law Journal, Vol. VIII., p. 117.

CHAPTER XIII.

PERPETUAL LEASES.

Grants of land *pro servitiis impensis vel impendendis*, i.e., for past or future services, were usually in the form of perpetual leases.

In the introductory chapter on land tenures the different names applied to such grants have been noticed.

In Chera Mangalath Manakel Narayanan *v.* Uni Rarichan (*a*) the High Court (Turner, C. J., and Forbes, J.) accepted a finding by the District Judge of South Malabar, that the grants known as anubhavam or adima were perpetual leases irredeemable as long as the land remained in the grantee's family, and this decision was subsequently approved and followed in Manisheri *v.* Vakayil Kannan Nayar (Kernan and Kindersley, JJ.) (*b*) and more recently in Theyyan Nayar *v.* The Zamorin of Calicut (*c*).

The ancient opinion seems to have been that such grants of lands were resumable by the grantor on failure of heirs in the grantee's family and were inalienable except with the consent of the grantor. The term adima or kudima janmam, anubhavam, karankari or janmam kolu and karaima were defined by the Sudder Court in their Proceedings of the 5th August 1856, as follows :—

Adima or kudima janmam.

A permanent but inalienable right granted for favour or for performance of certain services.

"In this case the land is made over in perpetuity to the grantee, either unconditionally as a mark of favour, or on condition of certain services being performed. The terms adima and kudima, mean a slave or one subject to the landlord, the grant being generally made to such persons. A nominal fee of about two fanams a year is payable to the landlord to

(*a*) A. S. 595 of 1878, H. C. (*b*) A. S. 569 of 1879, H. C.
(*c*) I. L. R., XXVII Madras, 203.

show that he still retains the proprietary title. Land bestowed as a mark of favour can never be resumed; but where it is granted as remuneration for certain services to be performed, the non-performance of such services, involving the necessity of having them discharged by others, will give the landlord power to recover the land. The non-payment of the annual fee will form no ground for ousting the grantee, but it will be recoverable by action. The hereditary property of native princes cannot be conferred on this tenure, the ruling prince having only the right of enjoyment during life, without power to alienate.

Anubhavam. Relinquishment of land for enjoyment by the tenant in perpetuity.

"It was customary for princes, when conferring a title on any person, to grant him at the same time sufficient land to enable him to maintain the dignity of his position. Grants under this tenure were also bestowed upon persons for special services rendered, or for the future performance of certain services. The tenant cannot be ejected, except where there are conditions imposed and he fails to fulfil them; but, on the other hand, he and his heirs have only right of enjoyment and cannot alienate their title. A trifling annual fee is generally paid to the landlord to show that he has not surrendered the proprietary right.

Karankari or janmam kolu. Sale or transfer in perpetuity of the right of cultivation.

"In this case the land is made over for permanent cultivation by the tenant in return for services rendered. Where the proprietary title is vested in a pagoda, the grant will be made for future services. In some cases land is mortgaged on this tenure, the kanam mortgagee paying the surplus rent produce to the landlord, after deducting the interest of the money he has advanced. The tenant has, in North Malabar, only a life-interest in the property, which at his death reverts to the landlord. In the south, the land is enjoyed by the tenant and his descendants, until there is a failure of heirs, when it reverts to the proprietor. Except where the land is granted for special services, an annual rent is payable under this tenure The tenant's right is confined to that of cultivation, but it is permanent, and he cannot be ousted for arrears of rent, which must be recovered by action, unless there be a specific clause in the deed declar-

ing the lease cancelled, if the rent be allowed to fall into arrears.

Karaima.

Right of perpetual enjoyment.

"Lands made over by the trustees or managers of pagodas to those employed in performimg certain offices therein, are conferred on this tenure. So long as they fulfil their duties, the tenants are not liable to be ousted; to maintain an action of ejectment therefore it must be shown, either that they have neglected their duties which has rendered it necessary to employ other persons to perform them, or that they have endeavoured to set up a proprietary claim in subversion of that of the pagoda."

All the abovementioned tenures appear to be inalienable, but resumable by the grantor on failure of heirs in the grantee's family. There is, however, a singular absence of judicial authority in respect of these grants, and it is doubtful how far in the present day the Courts would recognize the grantor's power of resumption. At all events, the grantor's representative whould be required to prove clearly that the grant was inalienable and resumble, and if the land had passed to *bonâ fide* purchasers, they would probably be protected.

In one of the few recent cases relating to a tenure of one of these descriptions that I have come across, the Zamorin of Calicut attempted to force the holder of the grant, which was one on anubhavam right, to take a renewal every twelve years and to pay heavy renewal fees. The original grant had, it was admitted, been made many years ago but the grantees had transferred these rights to one Venkateswara Patter who had received a renewed grant from the Zamorin in 1862. The defendant Rama Patter, the successor of Venkateswara Patter, admitted that his predecessor had accepted a renewal of his grant in 1872 but maintained that he had done so as the former grant was evidenced by an unregistered document and as he considered it safer to hold under a registered deed. The Zamorin in the suit attempted to force the grantee to take a renewal in 1884, *i.e.*, twelve years from

the date of the prior grant and pay renewal fees contending that there was a custom in his estate under which the holder of an anubhavam tenure took renewals from time to time and paid renewal fees, but the Court (Subramania Ayyar and Benson, JJ.) held that no such custom had been made out and dismissed the suit (*a*).

The Privy Council has decided that the non-performance of services, which, in course of time, have become unnecessary, is no ground for resuming a grant of land burdened with a certain service (*b*), and the High Court (Morgan, C. J., and Kindersley, J.), in Payadeth Chamu Kurup *v.* Venmaniyar Mupil Nayar, followed the same principle. In that case, the janmi sued to recover certain lands which it appeared had been granted on a kanam lease which gave the tenant the right of perpetual enjoyment at a nominal rent on condition of his performing certain feudal services, such as attending the janmi at certain ceremonies, making him presents of curry-stuff, etc. The District Munsif dismissed the suit, finding that the tenants were holding under what he described as an anubhavam avakasham right of possession, and the High Court on second appeal upheld this decision and observed that there were no grounds for awarding recovery of the property as it appeared that the tenant was willing to render the services (*c*). In A. S. 704 of 1881 (South Malabar), the Kongat Nayar claimed the reversion of an estate belonging to Narikat Mutha Nayar, whose family had become extinct, on the ground that the estate was originally granted in consideration of some services to be performed at the death of each Kongat Valiya Nayar. The District Judge held that, in the absence of distinct evidence as to the terms of the grant, it could only be treated as an ordinary inam holding which would escheat to Government in the

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(*a*) Mana Vikrama *v.* Rama Patter, I. L. R., XX Madras, 275.

(*b*) Alexander John Forbes *v.* Meer Muhammad Tuquee, XIII Moore's I. A., 438.

(*c*) S. A., No. 243 of 1877, H. C.

absence of heirs. As regards temple lands held on service tenure (karaima) it has been held by the High Court, in Sanku *v.* Vettakara Vanigatt Shekhara Variar (*a*) and Mele Mandakot Chather Nayar *v.* Manaya Mangalath Variath (*b*), that such tenures cannot be capriciously determined as long as the grantee is ready and willing to perform the service. Such lands, it has been decided by the High Court in Threpatta Pisharotha Naraina *v.* Vyleri Manakal Vasudevan, are inseparable from the service and on failure of heirs in the grantee's family are resumable by the grantor (*c*).

Cases connected with grants, such as adima, anubhavam and karaima, have not of recent years often come under the consideration of Courts of Law.

(*a*) S. A., No. 254 of 1880, H. C. (*b*) S. A., No. 471 of 1880, H. C.
(*c*) S. A., No. 850 of 1881, H. C.

PART III.

MISCELLANEOUS.

CHAPTER XIV.—LOTTERIES.

CHAPTER XV.—MAPPILLAS. TIYANS.

CHAPTER XVI.—PAIMASH ACCOUNTS.

CHAPTER XVII.—STHANAMS.

CHAPTER XVIII.—TEMPLES.

PART III.

CHAPTER XIV.

LOTTERIES.

The system of lotteries, though not peculiar to Malabar, is more prevalent there than elsewhere. It is thus described by Mr. Græme in or about 1822:—

"Changati-kuri. A lodge or meeting of friends. It was formerly very common in Malabar among the natives and is still partially kept up for the purpose of discussing any particular subject or of enquiring into the conduct of any individual. It is not confined to people of the same caste, but may be composed of Nayars, Tiyans and Mappillas. Besides promoting social intercourse, it has a tendency to prudential consequences. It induces economy.

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"It is supported by the subscription of the members in the following manner. Suppose there are twenty-five members, that each contributes four fanams monthly, making a total stock for each month of one hundred fanams, that the society is limited to twenty-five months' duration, and every member is obliged to give an entertainment to the party once in the course of this period at his own house. It does not come to the members in regular turn, but is decided by lot, that is, every member places with his subscription a ticket with his name in deposit and a ticket is drawn every month by some indifferent persons, and the person whose name appears in the ticket drawn gives the entertainment and is entitled to the amount in deposit in the month. The entertainment is calculated to cost at most not more than ten per cent of one month's subscription of all the members, and the great advantage is derived from drawing a ticket at an early stage on account of the interest upon the sum for the remaining period. There is no other prize. Every member's subscription amounts in the

end to the whole principal gain which he can ever make. The greatest disadvantage to any member is the drawing his ticket towards the close of the duration of the society, the consequent loss of interest on his monthly subscription and the loss of principal expended in the entertainment, to the extent of two and a half months' subscription.

"But these are counterbalanced by the facility of procuring easy loans of money upon the security which the ultimate certainty of attaining a prize affords. The monthly subscriptions in the meantime are small and are not felt and induce a habit of saving which would not otherwise be practised.

"Kuri-muppan is the president of the society termed Changati-kuri whose duty it is to see the money collected or, on failure, to forfeit to the prize-drawer double the deficient subscription. He is entitled to the privilege of giving the first month's entertainment. The society has of late years fallen into disuse, partly because the European authorities have discouraged it among all public servants as liable to abuses, and partly because it does not enjoy the necessary power to enforce its rules by degradation or other punishment, and members are not to be found who will support it from their own respectability. The contempt of its regulations can only be attempted to be remedied by a tedious, vexatious and expensive appeal to a judicial tribunal, an appeal likely to be more particularly ineffectual from the compact of the parties being rather understood than expressed, and founded more upon a sense of honour than upon law or written agreement."

This is a fair description of the lotteries of the present day, with this exception, that the custom of the prize-holder giving a social entertainment has fallen into disuse and that the society is now a provident club conducted on business principles. It is usual for the prize-holder to execute an instalment bond for the amount of his future subscriptions in favour of the kuri-muppan which contains the usual clause for enforcing the whole sum if one instalment is not paid. From the number of suits which come into Court, it would seem that many of these lotteries are got up by needy adventurers.

After the passing of Act V of 1844, it was held by the Calicut Sub-Judge, that these lotteries were illegal. But the Sudder Court in 1857 (Hooper, Strange and Baynes, JJ.) took a different view holding as follows :—

"The Judges are clearly of opinion that such a transaction as the parties describe in the original pleadings in no way contravenes Act V of 1844. It has in it no element of chance or risk, the money paid by each subscriber being eventually returned to him. It is a provident and beneficial arrangement under which each party derives the benefit of having the use in his turn of a round sum; the only thing determined by lot is the turn in which that advantage shall be enjoyed, a circumstance which does not, in the opinion of the Judges, bring it within the scope of Act V of 1844" (*a*).

In Kamakshi Achari *v.* Appavu Pillai the High Court (Scotland, C.J., and Frere, J.) endorsed this view. They observed as follows :—

"Lotteries ordinarily understood are games of chance in which the event of either gain or loss of the absolute right to a prize or prizes by the persons concerned is made wholly dependent upon the drawing or casting of lots, and the necessary effect of which is to beget a spirit of speculation and gaming that is often productive of serious evils. It is to lotteries of this description that the Act, we think, must be construed to apply when declaring them to be 'common and public nuisances and against law,' and as such providing for their suppression. Here no such lottery appears to have taken place. It is not the case of a few out of a number of subscribers obtaining prizes by lot By the arrangement all get a return of the amount of their contributions. It is simply a loan of the common fund to each subscriber in turn, and neither the right of the subscribers to the return of their subscriptions, nor to a loan of the fund is made a matter of risk or speculation. No loss appears to be necessarily hazarded, nor any gain made a matter of chance, except perhaps as regards the payment of interest, which is only an ordinary incident of the contract of loan; and the benefit in this respect all, it seems, are intended to enjoy

(*a*) S. A. 169 of 1857, Sudder Decisions, 1858, p. 54.

alike. The drawing of lots appears only to be made the means of deciding the order or turn in which the loan is to be made to each member.

"There is in this, we think, nothing of that risk, speculation, and gaming which make ordinary lotteries a common and public nuisance, and which it was the policy and intention of the Act in question to provide against. The utmost that can be said is that it is an arrangement that, like many other unobjectional matters of agreement, is very likely to be attended with litigation, and we think that a transaction is not necessarily a lottery within either the spirit or letter of the Act, simply because a matter of whatever kind is agreed to be decided by lot" (*a*).

In a recent case from South Malabar (Vasudevan Nambudri *v*. Mammod) the question as to the legality of a kuri came before the High Court (Shephard, Officiating C.J., and Moore, J.). The plaintiff had organised a kuri by which a number of persons agreed that each should subscribe a certain sum of money by periodical instalments and that each in his turn, as determined by lot, should take the whole of the subscription for each instalment, all being returned the amount of their subscriptions and the common fund being lent to each subscriber in turn. The District Judge held that a kuri, where the fund was distributed by lot, was a lottery. The fact that the total monthly subscriptions were given to each member in turn, the order being decided by lot, was sufficient in his opinion to constitute a lottery within the meaning of section 294-A of the Penal Code. He accordingly found that the agreement entered into by the subscribers was illegal. The High Court, on second appeal, held that the agreement was not illegal and reversed the decision of the Lower Court, pointing out that the law, as laid down in Kamakshi Achari *v*. Appavu Pillai (*a*), had been followed without question for thirty-five years and that the introduction of section 294-A into the Indian Penal Code could not be held to have the effect of rendering the agreement illegal (*b*).

(*a*) I Madras H. C. R., 448. (*b*) I. L. R., XXII Madras, 212.

A question has been raised in certain cases which have recently come before the High Court as to whether a kuri, in which more than twenty persons are concerned, falls within section 4 of the Indian Companies Act and therefore if unregistered is illegal. In Ramasami Bhagavathar *v.* Nagendrayyan, which was from Madura district, it was found that persons more than twenty in number paid each a certain sum monthly to a stakeholder. The sum total of the subscriptions was then paid over as a loan free of interest to one of the subscribers chosen by casting lots, and he was thereupon required to execute a bond with a surety obliging him to continue his monthly subscriptions to the end of the period for which the arrangement was agreed to hold good, that period being as many months as there were subscribers. The bonds in question were executed in favour of the stakeholder and the subscribers. A suit was brought on one of such bonds to recover the amount payable for subscription on account of the period subsequent to its execution. The High Court (Shephard and Best, JJ.) held that the obligees carried on business which had for its object the acquisition of gain, within the meaning of the Companies Act, 1882, section 4, and accordingly constituted an illegal Association and that the suit was not maintainable (*a*).

In Panchena Manchu Nayar *v.* Gadinhare Kumaranchath Padmanabhan Nayar, from Malabar, it appeared that the prize-winners in a lottery in which more than twenty persons took tickets covenanted with the promoters of the lottery to continue their subscriptions in respect of the successful ticket for two years more, in accordance with the arrangement under which the lottery was established. The money not having been paid, the promoters brought a suit on the covenant. The learned Judges (Subramania Ayyar and Davies, JJ.)

(*a*) I. L. R., XIX Madras, 31.

distinguished this case from Ramasami Bhagavathar *v.* Nagendrayyan (*a*) as follows :—

"The right to collect the subscriptions due periodically by each ticket-holder rests only with the two organisers. The duty of paying the amount collected to the person entitled is cast upon them. It is to them that, unlike the case of Ramasami Bhagavathar *v.* Nagendrayyan (*a*), the particular ticket-holder, who, as the prize-winner, has received the periodical collection, has to give the necessary securities for the payment of the future instalments due by him. Further, if any ticket-holder commits any default in paying his subscriptions according to the instalments, the proprietors alone are responsible to make up the deficiency caused by such default and are, consequently, at liberty to admit at their discretion persons not mentioned in Exhibit I as ticket-holders in lieu of the defaulters. The only obligation each ticket-holder lies under is to pay his subscription from time to time to the proprietors, and the only right possessed by him is to get from them his several shares of the twenty-five rupees deducted at the drawing of each lot out of the total collections and distributed among the ticket-holders, other than those who have received prizes, and also to receive from the same parties the amount of the prize, when he in his turn becomes the prize-winner. It is thus manifest that the only persons associated with each other, in the sense of possessing joint rights, or being subject to joint obligations, or of having mutual rights and duties, are the two proprietors, whilst the other ticket-holders are, in the language of James, L. J., in Smith *v.* Anderson (*b*), 'from the first entire strangers who have entered into no contract whatever with each other.'

"It follows therefore that the very first condition laid down by the section relied on is wanting here" (*c*).

The facts of a more recent case, Narayanasamy *v.* Jambu Aiyan, were as follows. At the time of starting a kuri an agreement was entered into between the nine defendants and the other subscribers to the kuri. The instrument

(*a*) I. L. R., XIX Madras, 31. (*b*) L. R., 15 Ch. D., 247.
(*c*) I. L. R., XX Madras, 68.

that was drawn up, while giving the defendants the right to conduct or manage the affairs of the kuri, reserved to the body of the subscribers, who were more than twenty in number, the right in various ways to control the defendants and otherwise showed that the defendants were merely the agents of the subscribers. Under these circumstances the question was raised as to whether the members of the kuri constituted an illegal association, as not having been registered, or whether the defendants were alone proprietors of the fund, as in Panchena Manchu Nayar *v.* Gadinhare Kumaranchath Padmanabhan Nayar (*a*). The High Court (Benson and Boddam, JJ.) held as follows :—

"In Manchu Nayar *v.* Padmanabhan (*a*) two persons started a kuri describing themselves in the programme which they drew up for that purpose as the proprietors. The programme contained the proposed arrangements of the proprietors and their proposed method of carrying it on and the subscribers signed it in token of their assent and as evidence that they became thereby subscribers. That case is totally different from the present case where the whole body of subscribers join in an agreement to start a chit fund and are all equally interested in it and retain power in themselves to control the acts of their appointed office-holders." It was consequently decided that the association required registration (*b*).

In Vasudevan Nambudri *v.* Mammod (*c*), which has been previously mentioned, the District Munsif found that the kuri to which the suit related did not come under the Companies Act, but the question was not decided by the High Court as the case had to be remanded to the Court of First Instance for trial on the merits.

Closely akin to the kuri is the kuri-kaliyanam which is thus described by Mr. Græme :—

"It is an entertainment given by a respectable native at

(*a*) I. L. R., XX Madras, 68.

(*b*) C. R. P. 583 of 1899, XI Madras Law Journal, 130.

(*c*) I. L. R., XXII Madras, 212.

which all his friends who are invited present a certain sum of money and a certain number of cocoanuts, plantains, betel-leaves and areca-nuts, every man according to his fancy, to the entertainer. The host feeds all those who come and has diversions for the company. An account is kept of what each guest offers, and, when these guests in their turn announce that an entertainment is to be given by them, the person who has formerly had the benefit of an entertainment is expected to be present and to make a return at least equal to, but in general half as much again and sometimes double, what he has received.

"To any person who evades the invitation and does not send the proper present of money and fruit, a small vessel of arrack and the bone of a fowl are sent in derision to shame him into a more liberal spirit, and he is desired to eat and drink them and to return the money he formerly received. This in general was sufficient to ensure a compliance with the custom."

The question has arisen whether there is any legal obligation on the part of the host to return the money presented to him when he is invited in his turn by his *quondam* guest. In A. S. 640 of 1880 (South Malabar), the District Judge held that the obligation was moral only and was not enforceable at law and there is a similar decision by Mr. Holloway as Sub-Judge of Calicut passed in 1857 (*a*).

(*a*) Zillah Decisions, Calicut Sub-Court, January 1857, p. 12.

CHAPTER XV.

MAPPILLAS—TIYANS.

The Mappillas of North Malabar follow the Marumakkathayam system of inheritance, whilst the Mappillas of South Malabar, with some few exceptions, follow the ordinary Muhammadan Law. Among those who profess to follow the Marumakkathayam Law, the practice frequently prevails of treating the self-acquisitions of a man as descendible to his wife and children under Muhammadan Law. Among those who follow the ordinary Muhammadan Law, it is not unusual for a father and sons to have community of property and for the property to be managed by the father and, after his death, by the eldest son.

The Tiyans of North Malabar as a rule follow the Marumakkathayam system of inheritance and those of South Malabar the Makkathayam. The Tiyans who follow Makkathayam are not governed by the ordinary Hindu Law in all its incidents.

(1) The Mappillas of North Malabar follow the Marumakkathayam system of inheritance.

The Sudder Court, in S. A. 5 of 1809, at first refused to recognize the local usage among Mappillas of North Malabar (I Sudder Decisions, p. 29). But in A. S. 44 of 1816, the Provincial Court of the Western Division held that the Marumakkathayam Law of inheritance was applicable generally to Mappilla families in Cannanore. This rule was subsequently followed by the Sudder Court in 1855 and 1860 (*a*). In a case decided in 1860, Mallile Uppanna

(*a*) Cf. S. A. 125 of 1855 and S. A. 265 and 651 of 1860.

Pallichi *v.* Telalkunata Musaliyar Avella, Mr. (afterwards Mr. Justice) Holloway, the Civil Judge of Tellicherry, dealing with a North Malabar Mappilla family, laid down the law as follows :—" The presumption of course is that the descent is that of nephews, as is the rule of North Malabar universally," and the Sudder Court on appeal upheld his decision (*a*). In Aiyappalli Kuttiassan *v.* Chalil Beyatumma, the High Court (Shephard and Subramania Ayyar, JJ.) referred to this decision of Mr. Holloway and held that, in the case of Muhammadans in North Malabar, the presumption was that they followed Marumakkathayam (*b*). A few years, however, after this decision had been passed Mr. Justice Subramania Ayyar, in his judgment in Assan *v.* Pathumma, made the following observations: " Now there can be no doubt that, even in the case of Mappillas of North Malabar, the Muhammadan Law, as the law of their religion and their original law, is their general law, the Marumakkathayam rules in regard to Mappillas who follow them being rules of later adoption and forming as far as they go in the case of such persons exceptional rules modifying the general law" (*c*). Mr. Justice Subramania Ayyar refers to a passage in Mr. Logan's Malabar Manual as his authority for the proposition that, in the case of Mappillas of North Malabar, the Muhammadan Law is the original law and Marumakkathayam rules are of later adoption (*d*). Mr. Logan, it will be found, alludes to the adoption of the Marumakkathayam law of inheritance by the Nambudris of Payyanur in North Malabar (*e*) and then writes, " And it is noteworthy that the Muhammadans settled there (Mappillas) have done the same thing." Mr. Logan here assumes that the Mappillas of North Malabar were Muhammadans in religion before they adopted the Marumakkathayam law of inheritance. There can however be but little doubt

(*a*) S. A. 651 of 1860. (*b*) S. A. 380 of 1895, H. C.

(*c*) I. L. R., XXII Madras, 494, at page 505.

(*d*) Logan's Malabar Manual, vol. I., p. 273.

(*e*) As to this reference may be made to p. 20, note *ante*.

that a considerable portion, at all events, of these so-called Mappillas were followers of Marumakkathayam rules and customs long before they embraced the faith of Islam.

In a more recent case, Kumhimbiumma *v.* Kandy Moithen, it has been pointed out by the High Court (Subramania Ayyar and Benson, JJ.) that, the fact that, in Assan *v.* Pathumma (*a*), the property dealt with belonged to a person who was admittedly governed by Muhammadan Law, should not be overlooked and the learned judges then observe as follows: "That case should not be understood as laying down that in every case between Muhammadans in North Malabar, even when they are members of a Marumakkathayam tarwad, the devolution of property is governed by the Muhammadan Law until the contrary is shown. The question will, to a great extent, depend upon the circumstances of each case and the presumption would often be in favour of the Marumakkathayam rule of devolution, since we know that, in fact, the rule is followed in very many instances by such families" (*b*). The result of these decisions appears to be that this question is left as it was decided in 1860 by the Sudder Court following Mr. Holloway's *dictum* (*c*).

In 1875 a question arose whether a family was governed by the Marumakkathayam system of inheritance or by Muhammadan Law. The District Judge of South Malabar found that the property was originally settled on the females and was intended to be impartible and to descend in the female line, but that the intention of excluding the descendants of males had not been consistently carried out, and, on these facts, the High Court decided that the case must be governed by Muhammadan Law (*d*).

(2) Among those who profess to follow the Marumakkathayam Law, the practice frequently prevails of treating the self-acquisitions of a man as descendible to his wife and children under Muhammadan Law.

The first case in which this custom was set up in the

(*a*) I. L. R., XXII Madras, 494. (*b*) I. L. R., XXVII Madras, 77.

(*c*) S. A. 651 of 1860.

(*d*) A. S. 485 of 1875 (South Malabar), S. A. 429 of 1876, H. C.

Courts arose in 1851 in Tellicherry and Mr. Frere, the Civil Judge, observed as follows :—

"Whether such a mixed rule of inheritance, which is neither in accordance with the usual custom of Malabar in regard to other castes nor to the ordinary Hindu Law, could be held to have the force of law in families of the above description, it is not necessary to enquire in the absence of any satisfactory proof that the property derived by the respondents was acquired by their father" (*a*).

In admitting S. A. 269 of 1855, the Sudder Court questioned the propriety of two distinct laws of inheritance prevailing in the same family. And in A. S. 110 of 1861 (Tellicherry), Mr. Holloway decided against the validity of what he termed "a piebald system of descent." The custom appears to have been set up in a case which went before the Privy Council in 1871 but it was found that it was not sufficiently established (*b*).

That the custom exists, notwithstanding the attempts of the Courts to stifle it, there can be no doubt. It is in full force in the Laccadive Islands.

In Chathunni *v.* Sankaran, the parties to which were Tiyans from North Malabar, it was held by the High Court (Turner, C. J., and Hutchins, J.) that, where a woman belonging to a Malabar tarwad governed by the Marumakkathayam Law has issue by a man who is governed by the Makkathayam Law, such issue are *primâ facie* entitled to their father's property in accordance with the Makkathayam Law and to the property of their mother's tarwad in accordance with the Marumakkathayam Law (*c*). If a similar case was to come before the High Court in which Mappillas were concerned, the view taken would no doubt be the same.

(*a*) A. S. 124 of 1851, Zillah Decisions, Tellicherry Civil Court, December 1851, p. 9.

(*b*) Scrumah Umah *v.* Palathan Vitil Maryaboothy Uma (Sutherland's Privy Council Reports, Vol. II., 418).

(*c*) I. L. R., VIII Madras, 238.

The difficulties of administering a double law of inheritance are great, but the Courts are bound to decide which property is ancestral and which self-acquired, and, if the custom is proved that the nephews inherit one and the children the other, to give effect to that custom. If the custom is proved, the burden of proving what portion of the property was self-acquired will rest on the children, and it will not suffice to show that it was acquired by their father. They will have further to show that it was acquired by private funds at his absolute disposal and not by funds belonging to the tarwad of which he was the manager.

(3) Among those who follow the ordinary Muhammadan Law, it is not unusual for a father and sons to have community of property and for the property to be managed by the father and, after his death, by the eldest son.

This custom is not peculiar to Malabar and it is always a difficult question to decide as to what extent the presumptions of Hindu Law should be held to be applicable to Muhammadan families living in co-parcenary.

In Ammutti *v.* Kunji Keyi the District Judge of South Malabar was of opinion that the same presumption as to joint ownership was to be applied as a presumption of law in the case of Mappilla families as in the case of Hindus. The High Court (Turner, C. J., and Hutchins, J.), however, held that this was an erroneous view to take and observed that, although Mappillas in Malabar ordinarily followed closely the Hindu custom of holding family property undivided, yet that, as Mappillas were not subject to the same personal law as the Hindus, their claims could not be governed by the legal presumption of joint ownership (*a*).

Subsequently the question as to whether property which had been enjoyed jointly by the members of a Muhammadan family could be held to be joint family property, within the meaning of Article 127 in the second Schedule attached to the Limitation Act, came before the High Court in a

(*a*) I. L. R., VIII Madras, 452.

case (Patcha *v.* Mohidin) from Cuddapah. It was urged that the phrase 'joint family property', as used in this Article, included property left by a deceased Muhammadan and divisible among his heirs until it was divided, and that Article 127 applied to a suit for the division of such property. The Judges (Parker and Wilkinson, JJ.), however, refused to accept this view; observing :—

"It seems to us impossible that property, which was in no respect joint family property in the Hindu sense up to the date of the deceased's death, should become joint property in the Hindu sense because of his death, and we cannot but think the words 'joint family property' in Article 127 were intended to refer to joint family property in the Hindu sense of the term" (*a*).

In a more recent case (Abdul Kader *v.* Aishamma) from Malabar where a Mappilla woman, alleging that she had been within a year of bringing her suit excluded from the possession of certain family property which had been enjoyed by her and certain of her relations on her mother's side in common for a number of years, sued for the recovery of the share to which she was entitled under Muhammadan Law. For the defendants it was urged that the property had been acquired in the time of the plaintiff's maternal grandfather more than thirty years prior to the suit and that the claim was consequently barred under Article 123 of the Limitation Act. On reference to a Full Bench of the High Court it was decided (Collins, C. J., Muttusami Aiyar, Parker, Wilkinson and Handley, JJ.) that the case was governed neither by Article 123 nor by 127, but by Article 144 and that the suit was consequently not barred (*b*).

TIYANS.

The Tiyans of North Malabar, as a rule, follow the Marumakkathayam system of inheritance, and those of South Malabar, the Makkathayam. The Tiyans who follow Makkathayam are not governed by the ordinary Hindu Law in all its incidents.

Allusion has already been made in this chapter to a suit among Tiyans from North Malabar relating to the question

(*a*) I. L. R., XV Madras, 57, *vide* also Kasmi *v.* Aishamma, I. L. R., XV Madras, 60.
(*b*) I. L. R., XVI Madras, 61.

as to the system of inheritance that should be followed in the case of the issue of parents governed by different systems. A few instances where the High Court has recognized the existence among Makkathayam Tiyans of customs not in accordance with Hindu Law as laid down in the Mitakshara may be noted.

In Rarichan *v.* Perachi, the Judges (Collins, C. J., and Parker, J.) observed that the Tiyans of Malabar who followed Makkathayam were not governed by the Hindu Law, pure and simple, and that their usages with regard to divorce, re-marriage and inheritance were not entirely in accordance with the Hindu Law, and held that a custom had been made out under which in South Malabar, or, at all events, in Calicut taluk, in an undivided Tiyan tarwad the self-acquired property of one of the members passed on his death to his brother in preference to his widow (*a*).

In Imbichi Kandan *v.* Imbichi Pennu, however, where it was shown that the brothers were divided and had no community of interest it was held (Parker and Subramania Ayyar, JJ.) that, on the death of a member of a Makkathayam Tiyan tarwad, his widow and daughter were entitled to succeed to his self-acquisitions in preference to his father's brothers (*b*).

In Kunhi Pennu *v.* Chiruda, the Sub-Judge of Calicut, having been directed by the High Court (Collins, C. J., and Benson, J.) to take evidence as to custom, found that, among Calicut Makkathayam Tiyans, the widow of a deceased owner was a preferential heir to his mother, and, when his finding reached the High Court, no objection was taken to it (*c*).

In Raman Menon *v.* Chathunni, the High Court (Muttusami Aiyar and Best, JJ.) accepted the finding of the Sub-Judge of South Malabar, that, according to the custom prevailing among Makkathayam Tiyans, com-

(*a*) I. L. R., XV Madras, 281. (*b*) I. L. R., XIX Madras, 1.
(*c*) I. L. R., XIX Madras, 440.

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pulsory partition could not be effected at the will of one member of the tarwad (*a*).

In Velu *v.* Chamu, which was a suit for partition among persons belonging to the caste of Iluvans of Palghat, it was urged that the ordinary Hindu Law relating to partibility of property had no application to Iluvans and Raman Menon *v.* Chathunni (*a*) was relied on. The District Judge, however, pointed out that the parties to Raman Menon *v.* Chathunni were Tiyans of Calicut taluk and was of opinion that it could not be held that that decision applied to anyone except Tiyans of that taluk. He further observed that it was "not certain that the Iluvans now formed a portion of the Tiyan community, or were bound by its customs and laws, even supposing their origin to have been identical. The almost universal prevalence of partition in the Iluvan community, as shown by the evidence which had been adduced, favoured the view that it was compulsory rather than dependent on mutual consent, and this conclusion was supported by the fact that in a long current of judicial decisions from the year 1872, the right to partition had been tacitly assumed"

On second appeal, the High Court (Subramania Ayyar and Davies, JJ.) upheld this decision and ruled as follows:—

"The case of Raman Menon *v.* Chathunni (*a*) cannot be taken to lay down that the rule of partibility does not prevail among the Iluvans of Palghat, even assuming that at one time Iluvans and Tiyans were of one class. The evidence shows, however, that Iluvans have long been treating themselves as a separate class from Tiyans and that they follow the rule of partibility. This is shown by proof of numerous instances of partition being enforced as a matter of right, and there is no instance in which it was refused" (*b*).

In Vattampurath Umyatha *v.* Poonatath Kandan a question was raised as to whether in a Makkathayam

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(*a*) I. L. R., XVII Madras, 184.
(*b*) I. L. R., XXII Madras, 297.

Tiyan family the daugther of the last male owner or the widow of a nephew of the last full owner of the property, the nephew having died before the last full owner, was entitled to succeed. The District Munsif decided that the daughter of the last full owner having married she, according to the usage prevailing among Tiyans following Makkathayam in South Malabar, ceased to have any right to succeed to the property of her father. He accordingly gave a decree in favour of the widow of the nephew. The Subordinate Judge on appeal reversed this decision holding that the alleged custom under which the daughter forfeited by marriage all her rights to succeed to her father had not been proved and the High Court (Benson and Moore, JJ.) on second appeal confirmed this decision, observing that, under ordinary Hindu Law, the widow of the nephew would have had no claim and that she had not proved any special custom among South Malabar Tiyans in support of her contentions (*a*).

(*a*) S. A. 518 of 1901, H. C.

CHAPTER XVI.

PAIMASH ACCOUNTS.

In a case decided by the Privy Council, Venkateswara Iyan *v.* Shekhari Varma (*a*), the Lower Courts made use of the Paimash accounts produced in evidence to determine the issue of fact as to whether the lands in suit were the Rajah's Sthanam lands or Devasam lands. The judgment of the Privy Council contains the following observations on the value of Paimash accounts as evidence :—

"On looking at these accounts, two observations at once occur. The first is that, putting them at the highest, they are only evidence of possession, having been rendered to Government for the purpose of informing them from whom they were to demand the revenue. The second is that they can hardly be said to be public documents at all, for, on the face of them, it is stated that they were never confirmed and never acted on. The person who made these returns may have believed that the lands were Devasam property, but his statement to that effect is a mere private opinion, unless and until it is affirmed or acted on in some public way. It is remarkable that in the suit of 1833 a copy of one of these accounts was refused to one of the litigant parties, on the very ground that the account had never been confirmed, and was only granted on its being discovered that a copy had already been given to his opponent. These documents should not have been treated as evidence."

In S. A. 770 of 1881, the High Court (Turner, C. J., and Muttusami Aiyar, J.) in remanding an appeal to the District Judge of South Malabar for re-hearing observed :— "The Court of first instance appears to have attached undue weight to the effect of certain Paimash accounts as evidence of title," and referred the District Judge to the observations of the Privy Council quoted above.

(*a*) I. L. R., III Madras, 384.

When the appeal came on for re-hearing the District Judge, Mr. Wigram, took occasion to go into the history of Paimash accounts in Malabar, and, as his judgment contains a clear resumé of the matter, the following extract from it is appended :—

"Before proceeding to dispose of the Appeal, it seems necessary that I should say a few words as to the weight to be attached to Paimash accounts in general, as I am convinced that some misapprehension on the subject exists both in the Privy Council and in the High Court.

* * * * *

"I believe that I shall be able to show that the Privy Council have altogether underrated the value of Paimash accounts in Malabar.

"There are four sets of accounts in the Collector's Office which are ordinarily known by the name of Paimash accounts, although, strictly speaking, only the accounts of 1805 to 1810 (Warden's Alavu Paimash) have any pretensions to the name of Paimash, that is, Survey accounts. The circumstances in which the various accounts were prepared were succinctly set out by the Board of Revenue in 1857, as follows :—(*a*).

"'In this communication, the Acting Collector gives an elaborate account of the various plans that have been adopted from time to time to obtain correct returns of the number of lands, gardens, etc., in the Malabar District, and of the causes of the failure of the different attempts to supply the want of reliable and systematically prepared Revenue accounts, which has been felt from the commencement of our rule, particularly on the failure of the quinquennial settlement in 1795-96, and the introduction of a Ryotwary administration.

"'In 1798-99, Mr. Smee, the Principal Collector, made the first attempt, after the assumption of the Province, to carry out a Revenue Survey of the southern central divisions. It does not appear what plan was adopted, but the scheme was soon abandoned in consequence of the corruption of the persons who were appointed to inspect the lands. The returns then prepared were never acted on.

(*a*) Proceedings of the Board of Revenue No. 4689, dated 23rd December, 1857.

" 'Between the years 1805 and 1810, Mr. Warden undertook the survey of the lands and gardens of the whole district. The plan adopted by Mr. Warden was to call on each revenue payer to send in a detailed return of his landed properties and holdings of every description assessible to the revenue, showing the particulars of seed sown, extent, rental and number of trees. The returns then prepared are called the Janma Paimash of 1805-06. Subsequently, a survey of the rice lands by measurers summoned from Coimbatore was completed, and is now known as the Alavu Paimash of 1806-10. Though this survey was a failure and never acted upon, the accounts under both denominations, the Acting Collector states, are, notwithstanding great inaccuracies, the most valuable record extant in the district. The cost of these surveys cannot be ascertained, but, as they extended over six or seven years, it is supposed the charges were considerable.

" 'The next attempt to survey the lands and gardens of the district was made by Mr. Commissioner Græme in 1820-23. He condemned Mr. Warden's surveys and showed that a large loss of revenue would result from acting on them. Mr. Græme commenced operations by dismissing or remodelling the entire Village Establishment and by appointing a new class of Desadikaris of his own selection. On these he proposed to confer hereditary sunnuds as an inducement to be honest, but the Honourable Court disapproved of the measure. Mr. Græme left the district in 1823, and Mr. Vaughan continued the survey. But after two years' trial this scheme, like the others, failed through the corruption of the persons appointed to carry it out, and from the proprietors and ryots giving false returns of the holdings, etc.

" 'The last effort to obtain reliable Revenue accounts was commenced in 1833 under Mr. Clementson, and it is the one regarding which the Government have called for further information. The plan adopted was to require the Desadikaris to make returns of all rice and garden lands, etc., within the amsams and to inspect the documents and to collate the Desadikaris' Paimash accounts of 1820-25. The Tahsildars were directed to check and supervise the preparation of these lists and transmit the returns to the Huzur, there to be drawn up as kulawar chittas.

" 'In consequence of the backwardness and incompetency of the village officers, a sufficient number of the returns known as Pukilvivaram (or description of crops) was not received in the Huzur till 1843 to make it worthwhile to commence operations. In that year, an extra establishment was sanctioned for the purpose, and about one-half of the returns prepared by the Desadikaris were copied into the form of kulawar chittas, but the worthlessness of the returns from which they were framed was discovered on the first attempt to verify the accounts, and the work was therefore suspended and further expenditure on that account avoided.' "

" We may conveniently refer to the accounts as

Smee's Paimash of 1798-99.
Warden's Paimash of 1805-10.
Græme's Paimash of 1820-25.
Clementson's Pukilvivaram of 1833-43.

" We have very little evidence as to the basis of Smee's Paimash, and it was probably compiled entirely by village officers, many of whom were corrupt.

" Warden's Paimash was compiled on information given by the Revenue tax-payer, and the measurements were made by officers from Coimbatore, who were perhaps a little less corrupt than the Malabar village officers.

" The value of Græme's Paimash in a Court of Justice consists in a fact, which is not noticed by the Board of Revenue, that the tenants were all called upon to deposit copies of their title-deeds in the Collector's office. Clementson's Pukilvivaram was really little more than a rectification of Græme's Paimash.

" Now it is obvious that, although the accounts as to measurements may be wholly unreliable and valueless for revenue purposes, the entries of the names of the janmis and the actual cultivators may be of the highest value, not only as a record of private rights but as admissions. The reason why the Government append a certificate to copies of Paimash accounts granted by them that they were not confirmed and not acted on, is lest they should hereafter be prejudiced in dealing with escheat lands. All that the certificate imports is that the Government decline to be responsible for the accuracy

of the entries. At the time of Warden's Paimash the Revenue tax-payer was for the most part the janmi, and information obtained from the janmis as to the names of their tenants may be relied on. Similarly, Græme's Paimash was compiled on information received from the tenant and often amounts to a valuable admission, more especially when, as frequently happens, a copy of the demise deposited with the Collector under the signature of the demisee is produced. These have been frequently held to constitute acknowledgments within the meaning of s. 19 of the Limitation Act. When all the Paimash accounts of the various years agree as to the name of the janmi and tenant and of the land, they are very strong corroborative evidence of title. Even when they differ, by a careful discrimination they are valuable either for the purpose of confirming or contradicting the other evidence as to title. I should regret very much to see Paimash accounts discarded as evidence of title."

In Keshavan *v.* Vasudevan the High Court (Turner, C. J., and Kindersley, J.) held that an entry in the Paimash accounts is not *per se* sufficient evidence to establish a right to property which is denied (*a*).

In an appeal from the Sub-Judge of South Malabar the High Court (White, C. J., and Moore, J.) has in a recent decision considered the question as to the admissibility of Paimash accounts as evidence. The appellant in that suit had filed before the Sub-Judge a number of extracts from certain old Paimash accounts in proof of a claim advanced by him to certain property. Before the High Court it was urged on behalf of the respondents that these documents were worthless as evidence and that the Sub-Judge should have rejected them as inadmissible in evidence, on the authority of the decision of the Privy Council in Venkateswara Iyan *v.* Shekari Varma (*b*). The Judges in disposing of this argument observed as follows :—

"On referring to the judgment of the Privy Council it will be found that what their Lordships there held, with reference to certain old Malabar Paimash accounts which had been produc-

(*a*) I. L. R., VII Madras, 297. (*b*) I. L. R., III Madras, 384.

ed, was that 'looking at these accounts two observations at once occur. The first is that, putting them at the highest, they are only evidence of possession, having been rendered to Government for the purpose of informing them from whom they were to demand the revenue. The second is that they can hardly be said to be public documents at all, for on the face of them it is stated that they were never confirmed and never acted on.' It is, however, as we understand the arguments of the Officiating Advocate-General, mainly as evidence of possession that he relies on these Paimash accounts in the present case, and as such their Lordships distinctly hold that they are admissible. Further, on referring to the exhibits before us in this appeal, it will be seen that the endorsement by the Collector to the effect that the accounts had never been confirmed and never acted on applies only to the Paimash of 1824-25 and that no such endorsements are to be found on the older, and therefore more important, accounts of 1798-99 and 1806-07. For these reasons we consider that it must be held that these older Paimash acounts were rightly not excluded from consideration, although we are also constrained to find that their evidential value is very slight for the following reasons. The Paimash of 1798-99, as will be seen from a reference to the Proceedings of the Board of Revenue, was carried out shortly after the British acquired Malabar, but the scheme was soon abandoned in consequence of the corruption of the subordinate officials who were appointed to inspect the lands and the returns then prepared were never acted on (*a*). It is not possible to say from what sources the information to be found in these accounts was obtained, but, as they were put together very shortly after the Zamorin had ceased to be the ruler of the country, it is most probable that the information was furnished by his subordinate officers and kariastans. If this view is correct it would follow that these accounts are admissible under s. 13 of the Evidence Act as showing particular instances in which the right of the Zamorin to certain of the lands now in dispute was claimed. The next Paimash to be considered is that of 982 (1806-1807) known as Warden's Paimash. The Proceedings of

(*a*) *Vide* Proceedings of the Board of Revenue, No. 4689, dated 23rd December, 1857.

the Board of Revenue, to which allusion has already been made, shows that the plan adopted by Mr. Warden was to call on each revenue payer to send in a detailed return of his landed properties and holdings of every description assessable to revenue. It will be found that, although the survey was a failure and was never acted on, the Collector (Mr. afterwards Sir W. Robinson), on whose report the Proceedings above referred to were based, was of opinion that the accounts, notwithstanding great inaccuracies, constituted the most valuable record extant in the district and Mr. Logan in his Malabar Manual gives a similar opinion (*a*). Mr. Logan also publishes a proclamation issued with reference to this Paimash in which it is stated that it is expected that all janmis will render a true and faithful account of the pattam of their estates and the local revenue servants are directed to assist the janmis in getting information from their tenants as to the existing state of their landed properties (*b*). There can therefore be but little doubt that the information to be found in these accounts with respect to the lands now in dispute was furnished by the Zamorin and his subordinate officials. * * *

"The next Paimash to be considered is that of 1000 (1824-25). It is the extracts from the accounts of this Paimash (known as Græme's Paimash) that bear the endorsement to the effect that the accounts were never verified nor confirmed by any competent authority and that the bulk of them were reported by the Collector (Mr. Vaughan) as being of the most grossly fraudulent description. As regards this Paimash the Board of Revenue, in the Proceedings already quoted, states that it was a failure, owing to the corruption of the subordinate officials appointed to carry it out and to the fact that the proprietors of the lands furnished false returns as to their holdings. As to this Mr. Wigram, in the judgment an extract from which has been already quoted, observes that the value of Græme's Paimash consists in the fact that the tenants were all called upon to deposit copies of their title-deeds in the Collector's office, but it will be found that the Collector, on whose letter these Proceedings were passed, reported that at

(*a*) Malabar Manual, Vol. I., p. 689.
(*b*) Malabar Manual, Vol. II., p. 253.

the time that the settlement was being carried out the country 'teemed with fictitious deeds and that temporary deeds and agreements were executed with a view of corresponding with a survey notoriously fallacious.' There appears to be no doubt that the accounts of this Paimash are most inaccurate and that some of proprietors of lands and others with fraudulent intention furnished false information to the officials employed in the survey. It is therefore easy to understand why the Revenue officials have refused to act on them, although it does not therefore follow that they are absolutely inadmissible as evidence. The extracts from these accounts filed in the present case show that in 1825-26, when this survey was going on, the Zamorin or his subordinates sent in returns to the Revenue officials in which his janmam right to certain Rayiranallur Chirikkal lands was asserted and that, as far as can be seen from them, no similar claim was made on behalf of the Paranambi. They would therefore appear to be admissible under s. 13 of the Evidence Act" (*a*).

(*a*) Zamorin Rajah of Calicut *v.* Paramadathil Rama Nambi, A. S. 184 of 1898, H. C.

CHAPTER XVII.

STHANAMS.

The word Sthanam means a dignity and primarily denotes the status of the senior Rajahs in the Malabar Kovilagams or palaces. Their position is also called Kurvalcha. The theory is that when a Rajah attains to the rank of first, second, third, fourth, etc., in the family, he resigns his place in the Kovilagam or palace in which he was brought up and lives apart on the property set apart for his Sthanam or dignity.

The creation of a Sthanam, with property appurtenant thereto, indicates a somewhat advanced stage of civilization when joint ownership was developing into individual ownership. Probably the first step was the separation of certain portions of the common property for the individual enjoyment of the senior Rajahs, the other members of the family, male and female, being supported by the Kovilagam in which they were born. The Kovilagam was managed in two instances, Calicut and Walluvanad, by the senior female or Tamburatti, and in other Royal families by the senior male who had not attained to the rank of senior Rajah. Although the rule is that one who attains to a Sthanam ceases to have any interest in his Kovilagam, the practice is not always in conformity with the rule, and a Rajah who has attained to a Sthanam frequently exercises an all-powerful influence in the

family councils with regard to the management of the Kovilagam property.

Accumulations made by a Sthani are at his absolute disposal, but, if undisposed of in his lifetime, pass to the Kovilagam or family in which he was born. The burden of proof lies on the alienee. A Sthani has a life estate and can create subordinate tenures in accordance with custom, but cannot alienate Sthanam property, except in cases of necessity and for the benefit of the tarwad.

As regards debts contracted by a Sthani, his position is essentially different from that of a Karnavan of a Malabar tarwad. The Karnavan is the accredited agent of the family, and a creditor dealing with him gives credit not to the individual but to the family in all matters apparently and ordinarily within the scope of a Karnavan's authority. On the other hand, a creditor dealing with a Sthani gives a personal credit only. It requires strict proof on his part of imminent pressure arising from circumstances over which the Sthani had no control to justify a secured debt being fastened on Sthanam property. The creditor is of course entitled to follow his debtor's assets in the hands of his heirs, but the succeeding Sthani can in no circumstances be personally liable for the debts of his predecessor.

Many Nayar families of respectability have adopted the customs of the Rajahs and created Sthanams to be filled by the senior member of one house or of several houses connected with one another by community of pollution. The Courts, however, have discouraged such attempts.

In its wider sense the word Sthanam has acquired the same meaning as Mirasi on the Eastern Coast, and is used to denote the position of some religious functionary, hereditary officer of State, etc., who by virtue of his office enjoys land rent free.

The decisions may be reviewed under three heads :—

(1) Constitution of Sthanams.
(2) Alienation by Sthanis.
(3) Debts contracted by Sthanis.

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(1) Constitution of Sthanams.

The constitution of the Kovilagams and the right of succession by seniority to the dignity of Rajah are described by the Joint Commissioners of Malabar in their Report dated 11th October, 1793, paras. 11 and 90.

The following description of the Palghat royal family is given in Mr. Warden's Report to the Board of Revenue dated 19th March, 1801 :—

" It originally consisted of eight Edams or houses equally divided from each other by the appellation of the northern and southern branch The members of these Edams are called Atchimars, five of whom, the eldest in age, bear the title of Rajahs, under the denomination of the 1st, 2nd, 3rd, 4th and 5th Rajahs, ranked according to their age, the senior being the first. On the death of the 1st Rajah, the 2nd succeeds and becomes the senior, the 3rd becomes 2nd, and so on to the 5th, the vacation of which rank is filled by the oldest of the Atchimars. By this mode of succession,the eldest Rajah is very far advanced in years before he accedes to the seniority, in consequence of which it used to be customary to entrust the ministry of the country to one of the Atchimars chosen by the Rajah. * * * The eight Edams of Atchimars above mentioned multiplied so numerously in their members that they afterwards divided

and formed themselves at pleasure into separate Edams, which they distinguished by their own names. The number now in existence consists of twenty-seven, of which twenty belong to the northern and seven to the southern branch. The number of Atchimars they contain including minors is about one hundred and thirty" (*a*).

In Mr. Logan's Preface to his collection of records relating to Malabar, he thus describes the family of the Zamorin :—

"There were at the time when Malabar fell to the British, as there are now, three Kovilagams, *viz.*:

"1. The Eastern or Kirake.

"2. The Western or Padinyara.

"3. The New or Pudiya.

"The eldest female (of the three Kovilagams) enjoys certain of the common lands attached to what is called the Ambadi Kovilagam and is regarded as the holder of a Sthanam or dignity. Next after her follow in succession the five eldest males of the tarwad, who stand in the order of their respective ages, and who are known respectively as

"1 The Zamorin or Tamudri.

"2. The Eradipad or Eralpad.

"3. The Munalpad.

"4. The Edralpad.

"5. The Nediripu Muthu Eradi.

"To each of them a certain portion of the tarwad property is allotted to enable him to maintain his Sthanam or dignity, and he is called a Kurvalcha or joint Ruler."

The earliest decision of the Courts with respect to Sthanams relates to the Sthanam of Kolatiri held by the senior Rajah of the Kola family. The senior member of two ancient Kovilagams sued to recover the arrears of Malikhana paid by the British Government to his junior who had been recognised as Sthani, to recover possession

(*a*) Reference may be made to Venkateswara Iyan *v.* Shekhari Varma (I. L. R., III Madras, 384; S. C., L. R. 8 I. A., 143), where the nature of the constitution of the Palghat royal family came under the consideration of the Privy Council.

of the lands and temples appurtenant to the Sthanam, and for his recognition by the members of all the five Kovilagams which formed sub-divisions of the Kovilagam, as head of the family and senior Rajah. He was supported by the heads of four Kovilagams, but resisted by the fifth, the head of the Chirakkal Kovilagam, who contended that, since the invasion of the ancient Kingdom of Kolattanad by the Ikkeri Rajah in 1738, the management of the estates had by agreement been vested in his branch, and that he and his ancestor had exercised rights of sovereignty, concluded treaties and been in enjoyment of the Malikhana. The Provincial Court dismissed the suit on the ground that it had been decided by Mr. Rickards, the Collector, in 1803, that the head of the Chirakkal branch was entitled to the dignity and emoluments of senior Rajah and that that decision had been acquiesced in by all the collateral branches of the family for seventeen years. The plaintiff appealed to the Sudder Court on the ground that he was no party to Mr. Rickards' decision and that. since Hyder's invasion of Malabar, the *de jure* Rajah had resided in Travancore and had appointed the head of the Chirakkal Kovilagam as his deputy. The Sudder Court decided against the plaintiff's claim on the ground that, when Tippu conquered Malabar, the ancient Kingdom of Kolattanad ceased to exist and that, when the British Government acquired Tippu's Malabar possessions in 1792, they made a fresh grant of a portion of the Kolattanad possessions to the Chirakkal branch of the family which was not liable to be called in question.

The following description of the Sthanams in the Royal family of Calicut is given in the judgment of the High Court in Vira Rayen *v.* Valia Rani Pudia Kovilagam, Calicut (Turner, C. J., and Muttusami Aiyar, J.).

"The parties to this suit are members of the family of the Tamudri Rajahs or Zamorins of Calicut. The family comprises three Kovilagams or houses, the Pudia, Padinjara, and Keyake Kovilagams. Of these, each has its separate

estate, and the senior lady of each Kovilagam, known as the Valia Tamburatti of the Kovilagam, is entitled to the management of the property of the Kovilagam. There are five Sthanams, or places of dignity with separate properties attached to them, which are enjoyed in succession by the senior male members of the Kovilagams. These are in order of dignity—(1) the Zamorin, (2) the Eralpad, (3) the Munarpad, (4) the Edatharapad, and (5) the Nadutharpad; and it would seem that, at the beginning of the century, there was also a sixth Sthanam known as the Ellearadi Tirumapad but, as no mention is made of this Sthanam in the present proceedings, it may be that it has ceased to exist (*a*).

"The senior lady of the whole family, who is known as the Valia Tamburatti, also enjoys a Sthanam with separate property; this Sthanam is termed the Ambadi Kovilagam.

"In the management of the properties of the three Kovilagams, the senior ladies are often assisted by the males or Rajahs who in time may pass out of the Kovilagam and attain one of the separate Sthanams.

"There are no family names, and the Sthanam-holders are distinguished after their deaths by the name of the year in which they respectively died. All property acquired by the holder of a Sthanam which he has not disposed of in his lifetime or shown an intention to merge in the property attached to the Sthanam, becomes on his death the property of the Kovilagam in which he was born" (*b*).

(*a*) *Vide* Dr. Buchanan's voyage through Mysore, Canara and Malabar, Vol. II., p. 83.

(*b*) I. L. R., III Madras, 141.

The passage in Dr. Francis Buchanan's voyage through Mysore, Canara and Malabar, alluded to by the High Court in this judgment, is as follows:—

"December 10th, 1800. I here had a conversation with one of the Carigars, or ministers of the Tamuri Raja, the person who manages the affairs of that chief. He says, that all the males of the family of Tamuri are called Tamburans, and all the ladies are called Tamburattis, all the children of every Tamburatti are entitled to these appellations, and, according to seniority, rise to the highest dignities which belong to the family. These ladies are generally impregnated by Nambudris, although if they choose, they may employ the higher ranks of Nayars, but the sacred character of the Nambudris almost always procures them a pre-

In certain litigation, respecting the Sthanams in the family of the Punnatur Rajah which came before the High Court, an attempt was made to prove that an ancient custom prevailed in that family of setting apart certain properties as male and certain as female properties. If, however, the evidence in this case is carefully considered, it will, I think be admitted that the existence of the alleged custom

ference. The ladies live in the houses of their brothers, for any amorous intercourse between them and their husbands would be reckoned scandalous. The eldest man of the family is the Tamuri Raja, called by Europeans the Zamorin. He is also called Mana Vicrama Samudri Raja and is crowned. The second male of the family is called Eralpata, the third Munalpata, the fourth Edatar Patana Raja, the fifth Nirirupa Muta Eraleradi Tirumalpata Raja, and the sixth Ellcaradi Tirumalpata Raja. The younger Tamburans are not distinguished by any particular title. If the eldest Tamburatti happen to be older than the Tamuri, she is considered as of higher rank. The Tamuri pretends to be of a higher rank than the Brahmans, and to be inferior only to the invisible gods; a pretension that was acknowledged by his subjects, but which is held as absurd and abominable by the Brahmans, by whom he is only treated as a Sudra." (Vol. II., p. 83.)

Reference may here be made to a somewhat remarkable suit for damages on account of alleged defamation heard by the District Judge of South Malabar in 1888, during the trial of which this passage from Dr. Buchanan's work was referred to as evidence that the Zamorin was a Nayar by caste. In that suit (Elaya Tirumalpad *v.* Mr. Logan, Collector of Malabar), the plaintiff, who is generally known as the Eliya Rajah of Nilambur, sued the Collector for defamation on the ground *inter alia* that he had in a letter to the Board of Revenue stated that the plaintiff was a Nayar. The plaintiff asserted that he and the Zamorin were of the same caste and that they were not Nayars, but belonged to a superior caste known as Samantan. The District Judge found that the members of the plaintiff's family, and also the descendants of certain other of the old Nayar Chieftains, had for some time back called themselves and been termed by others Samantas, but that there was in reality no distinctive caste of that name and that the plaintiff was a Nayar. He accordingly dismissed his suit. The High Court (Collins, C. J., and Parker, J.) on appeal confirmed the decree of the District Judge, giving, however, no opinion as to what caste the Tirumalpad belonged and disposing of this question with the observation that, even if the plaintiff was not a Nayar, there was no evidence that the Collector had knowingly misdescribed him as much. (A. S. 202 of 1888, H. C.) From the Census Report for 1891 it appears that in that year 1,225 persons returned themselves as Samantans, while in 1901 no less a number than 4,351 claimed to be members of this so-called caste.

was not satisfactorily made out (*a*). This practice was adopted by certain Nayar families of distinction until discountenanced by the High Court who, in Parrakel Kondi Menon *v*. Vadakentil Kunni Venna, refused to recognize any distinction between property so set apart for females and the common tarwad property (*b*).

Sthanams in Nayar families of distinction usually follow the same rule as Sthanams in Royal families. Succession to them is by priority of birth in two or more families which have separated from a parent stock. The Sthanams are frequently known by the name of Muppa Sthanam and Elama Sthanam. Cases have come before the Courts in which attempts have been made, sometimes with success, to show that the succession to the junior Sthanam is not by seniority but by selection, the right of which is vested in the senior Sthani. Two of such cases may be referred to. In Shangaran Nayar *v*. Govindan Ekan an attempt was made to show that the holder of a certain Sthanam had the right of selecting some fit person to be his successor and that the person so selected, or adopted, succeeded to all the rights of his nominator on his death. The District Judge of North Malabar (Mr. Logan) found in favour of the custom so set out and the High Court (Morgan, C. J., and Kindersley, J.), without giving any decision on the important question thus raised, dismissed the appeal on the ground that, as it was a suit for the redemption of a Kanam and as the plaintiff was at all events the *de facto* holder of the Sthanam, it was not necessary to decide as to the validity of his appointment as Sthani (*c*). In Kunhambu *v*. Kunhi Kana Kurup the following custom was set up. It was shown that, in a Nayar Marumakkathayam tarwad in North Malabar, there were two Sthanams, known as the Muppa Sthanam and the Elama Sthanam. It was alleged that a custom prevailed under which the holder of the Muppa Sthanam selected a member

(*a*) Sankara Valia Raja *v*. Valia Ram, S. A. 1844 of 1888, H. C.
(*b*) II Madras H. C., 41.
(*c*) R. A. 37 of 1874, H. C.

of the tarwad to fill the Elama Sthanam and that the person so selected, and not the senior member of the tarwad, succeeded to the Muppa Sthanam on the occurrence of the next vacancy. The Sub-Judge (Mr. V. P. D'Rozario), after a careful enquiry, found against the custom but the High Court (Turner, C. J., and Forbes, J.) on appeal reversed his decision and held that the custom had been established (*a*). The practice of creating a Karnavan Sthanam in an ordinary tarwad was effectually stopped by the decision of the High Court, in Velia Kaimal *v.* Veluthadatha Shamu, which has been quoted at length in the chapter on the rights and obligations of Karnavans (*b*).

In Timmappa Heggade *v.* Mahalinga Heggade, the High Court (Scotland, C. J., and Ellis, J.) had before them a case from South Canara in which the object of the suit was to establish the right of the plaintiff to be installed in an office of dignity in the family to which certain advantages and highly prized customary honors were attached. The question for decision was whether the dignity descended to the eldest male of the two divided branches or to the eldest male of the senior branch. No reference was made to the Malabar custom in the case of Sthanams, though the argument would have been strictly relevant. The High Court decided in favour of the senior male of the two divided branches (*c*).

(2) Alienations by a Sthani.

The leading case in the Sudder Court as to alienations by Sthanis was Manavicrama Nalam Rajah *v.* Soobramanyen Pattar. The Judges (Morehead and Strange, JJ.) disallowed a permanent lease granted by the fourth Rajah of Calicut. They observed :—

"On reference to the document upon which this suit is founded, the Court of Sudder Adalat find that the transaction involved a loss of ninety paras per annum to the

(*a*) A. S. 58 of 1880, H. C. (*b*) VI Madras H. C., 401.
(*c*) IV Madras H. C., 28.

Sthanam, the amount having been remitted to the plaintiff under the deed out of the rent payable on the land, as a free Brahmanical gift. The tenure of the Sthanam is only a temporary one and it is clear that the holder thereof cannot be authorized thus to alienate its revenue" (*a*).

In Illath Vittil Krisana Manoky *v.* The Collector of Malabar, Mr. Holloway, as Sub-Judge of Calicut, in dealing with the sale of Sthanam property, held as follows in 1856 :—

"The nature of Sthanam property according to the custom of Malabar is such that the present holder has in it a life interest only and the successor derives no benefit therefrom during the life of the present holder. It is obvious therefore that the burden of proving that the alienation of Sthanam property was for recognized and proper purposes lies upon him who asserts it. If in the much weaker case of tarwad property a valid alienation cannot be made without the consent of the principal subordinate members, who must nevertheless be presumed to benefit by the proceeds, still clearer must be the proof that the alienation of Sthanam property is for some purpose tending to the conservation or improvement of the property for those who are to succeed, where such successors participate during the lifetime of the alienor in none of the proceeds" (*b*).

And again in 1861 the Sudder Court (Strange and Frere, JJ.) refused to recognize a mortgage of the Sthani's interest beyond his lifetime. They say :—

"The Court observes that the allowance in question, being one for the maintenance of a dignity, was personal to the individual possessing the dignity and also inalienable therefrom. The previous Sthani could not hypothecate it beyond his lifetime, as it had to pass with the Sthanam to his successor" (*c*).

In A. S. 254 of 1860 (Tellicherry), Mr. Holloway, as

(*a*) S. A. 63 of 1852; Sudder Decisions, 1853, p. 216.

(*b*) O. S. 14 of 1855; Zillah Decisions Calicut, Sub-Court, July 1856, p. 39.

(*c*) S. A. 263 of 1860, Sudder Decisions, December 1861, p. 20.

Civil Judge, upheld a mortgage of Sthanam property granted by a Sthani, in consideration of the mortgagee withdrawing his claim to enforce a judicial sale, holding that to get rid of a troublesome judicial enquiry must be construed as an act for the protection and benefit of the Sthanam property.

In 1862, Mr. Sullivan as Civil Judge, Tellicherry, held that a Sthanam holder had no legal authority to execute a deed which from its conditions entailed permanent loss to the Sthanam and his Judgment was confirmed by the High Court (*a*).

Again, in Mupil Nayar *v.* Ukona Menon, the judgment of the High Court (Morgan, C. J., and Holloway, J.) contains the following observations on the alienability of Sthanam property :—

"In the case of the Zamorin there are decisions that the property of his house is held on terms different to those of others. In his case, however, it has never been decided that the property attached to his Sthanam is not liable for debts incurred for its conservation" (*b*).

In certain more recent cases the question of a Sthani's powers with respect to the Sthanam property has been further considered and his position has been contrasted with that of a Hindu widow and also with that of the holder of an impartible Zamindari. In Venkateswara Iyan *v.* Shekhari Varma, which went on appeal to the Privy Council, the question for decision was as to whether the Valiya Rajah of Palghat could set aside a perpetual lease of Sthanam land granted by one of his predecessors. In deciding this question, their Lordships made the following observations regarding the power of each Sthanamdar with reference to the Sthanam property :—

"It appears that in the families of the Malabar Rajahs it is customary to have a number of palaces, to each of which

(*a*) A. S. 227 of 1862, Tellicherry Civil Court ; S. A. 71 and 72, H. C.
(*b*) I. L. R., I Madras, 88.

there is attached an establishment with lands for maintaining it, called by the name of a Sthanam. * * * The Sthanamdar represents the *corpus* of his Sthanam, much in the same way as a Hindu widow represents the estates which have devolved upon her, and he may alienate the property for the benefit or proper expenses of the Sthanam" (*a*).

In the next decision to which reference need be made, the position of a Sthani was compared with that of the holder of an impartible Zamindari as then understood in this Presidency. That case was Mana Vikraman *v.* Sundaran Pattar (*b*), where certain land attached to a Sthanam in a Malabar Royal family had been alienated on perpetual lease under what was termed a Santhathi Brahmaswam grant (*c*). A suit was brought by the successor of the Sthani who had made the grant to set it aside, on the ground that a perpetual lease at a fixed rent was prejudicial to the interests of the Sthanam and was consequently beyond the powers of the Sthanam-holder for the time being to grant. The High Court (Innes and Muttusami Aiyar, JJ.) held that, assuming that the possession of a Sthanam-holder was analogous to that of a Zamindar, as the Sub-Judge who tried the suit had found it to be, the true view to be taken of the position of a Zamindar in this Presidency was that he had only a life interest in the property. The Judges then added as follows:—

"But he is also manager of the family for the time being and, if he grants a lease or makes an alienation to enure beyond his lifetime which is for the benefit of the family, it will be upheld as, on the other hand, any such transaction, if prejudicial to the family, will be set aside."

It was then pointed out that the grant of a permanent lease was undoubtedly an alienation as it put it for ever out of the grantor's power to obtain a more favourable

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(*a*) I. L. R., III Madras, 384; S. C., L. R., 8 I. A., 143.

(*b*) I. L. R., IV Madras, 148.

(*c*) A right of perpetual occupation vested in a Brahman and his heirs.

rent from the property, but the conclusion arrived at was as follows :—

"Such a grant may be highly prejudicial to the estate, but in the present instance the recognition of it by no less than eight successive Sthanam-holders is strong evidence upon which the Courts might properly find that the grant is not injurious to the estate, and they have so found."

In a recent case, Ittirarichan Unni *v.* Kunjunni, the view here expressed, that a Sthanam-holder enjoys much the same position as was assigned to the holder of an impartible Zamindari before the current of decisions was altered in 1888 (*a*), was referred to and acquiesced in. There the next reversioner brought a suit against a Sthanam-holder, who had granted a lease permitting the lessee to fell timber on certain lands attached to the Sthanam, praying for an injunction restraining the lessee from felling and for damages. The District Judge treated the Sthani as if he was a tenant for life impeachable for waste and granted the plaintiff a decree. The High Court (Collins, C. J., and Shephard, J.) in reversing his decision, observed as follows :—

"The position and powers of a Sthani have been often discussed. He is not a mere tenant for life and he is certainly not impeachable for waste in the sense in which that expression is used in the English law books. * * * * The Sthani is viewed by the District Judge as a simple wrongdoer, and, if it were true that he was a tenant for life impeachable for waste, this view might be correct But the Sthani has in truth much larger powers than are attributed to him by the Judge. He is the person who represents the estate for the time being and enjoys much the same position as was assigned to the holder of an impartible Zamindari before the current of decisions was turned in 1888 (*vide* Mana Vikraman *v.* Sundaran Pattar) (*b*). It is certainly open to a Sthani to make a lease of forest land for a term of years, and the mere fact that the alienation is

(*a*) By the decision of the Judicial Committee of the Privy Council in Sartag Kuari *v.* Deoraj Kuari, I. L. R , X All., 272 ; S. C., L. R., 15 I. A., 51.

(*b*) I. L. R., IV Madras, 148.

intended to hold good after his lifetime will not invalidate it. Similarly, it is competent to a Sthani to cut down forest trees for his own purposes, though, by the manner and extent of his operations, he may render himself liable to an action at the suit of the probable successor. It depends upon the circumstances of the case whether an alienation made by a Sthani or other conduct on his part in the management of his estate is of a character to render him liable to an action. * * * * By the mere cutting of trees, that being the ordinary and indeed the only way of enjoying the estate, no injury is done of which, as between the Sthani and his successor, the latter has any right to complain." (*a*).

This question has been further considered in certain recent cases. In Zamorin *v.* Vythi Pattar, where it was shown that a Zamorin, who was seventy-three years of age and had been in bad health for several years, a month before his death, granted a large number of leases for a term of twelve years, receiving as premium from the lessees a sum of five thousand one hundred rupees, which the evidence showed he had appropriated to his own use, the High Court (Subramania Ayyar and Boddam, JJ.) held that the Zamorin had no authority to grant such leases and that they were not binding on his successor (*b*).

In Krishna Pattar *v.* Kunju Pattar where the Rajah of Palghat, a man of seventy-four years of age who had suffered from a paralytic stroke, granted a Melkanam with respect to certain lands belonging to a Devasam attached to his Sthanam three years before the expiry of the term of the subsisting Kanam, under circumstances which led to the inference that the grant had been made without payment of renewal fees in order to benefit the tarwad of the lady with whom he had formed Sambandham, it was held by the High Court (Benson and Moore, JJ.), in Second Appeal, confirming the decrees of both the District Munsif and District Judge, that the grant of the Melkanam was invalid (*c*).

(*a*) I. L. R., XXI Madras, 144. (*b*) S. A. 978 of 1895, H. C.
(*c*) S. A. 84 of 1901, H. C.

In Mahomed *v.* Krishnen the position of a Sthanam-holder with respect to his reversioners was considered and the decisions in Venkateswara Iyan *v.* Shekhari Varma (*a*) and Muppil Nayar *v.* Ukona Menon (*b*), from which quotations have now been made, were referred to. There a suit had been brought by the junior members of a tarwad, which consisted of three Sthanams and three Tavalis, to set aside certain alienations made by the Karnavan. The High Court (Muttusami Aiyar and Parker, JJ.), in considering the question as to what were the conditions subject to which a suit could be brought to set aside the alienation of Sthanam property, referred to the decisions in Muppil Nayar *v.* Ukona Menon (*b*) and Venkateswara Iyan *v.* Shekari Varma (*a*) above mentioned and then observed as follows :—

"According to the custom of Malabar, the nature of Sthanam property is such, that the present holder has in it a life-interest and the successor derives no benefit from it during the life of his predecessor, whereas in ordinary tarwad property each member of the tarwad has a concurrent interest and a joint beneficial enjoyment. Although the position of a Sthani is analogous to that of a childless widow, in that both have a life-interest, both represent the estate or inheritance for the time being and both have a disposing power only to a limited extent, the analogy does not extend to the estate taken by the reversioner. Each male reversioner becomes under Hindu Law the full owner when the reversion falls in, whereas the person that succeeds to a Sthanam takes the same qualified estate that his predecessor had" (*c*).

(3) Debts contracted by Sthanis.

In A. S. 7 of 1843 the Sudder Court had before them a suit in which it was sought to recover a debt due by a deceased Rajah during the time that he occupied the position of Munalpad, or third Rajah of Calicut, from the heads of the Kovilagam to which he belonged as his

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(*a*) I. L. R., III Madras, 384 ; S. C., L. R., 8 I. A., 143.
(*b*) I. L. R., I Madras, 88.
(*c*) I. L. R., XI Madras, 106.

legal heirs. The following extract is taken from the Judgment :—

"It is a fact well known to all, and therefore only requiring mention, that, between the junior members or Tamburans residing in the different Kovilagams, or palaces, and their senior relations filling any of the Kurvalchas, or Rajahships, there is not, and cannot be from the nature of things, any reciprocity of interest or right to each other's property, their establishments, income and duties being distinct and under separate management.

"The Kovilagam is the family residence in which all who have not succeeded to one of the Rajahships remain under the management of the eldest resident female, or Tamburatti, of each branch of the family.

"The Kurvalcha, or Rajahship, is the dignity to which each male succeeds according to the priority of birth, no matter to which of the Kovilagams or families he may belong.

"Besides the above mentioned, there is a sixth Kurvalcha, or dignity, which is always filled by the eldest Tamburatti, or female, of the family, no matter with which of the Kovilagams she may be connected, whose proper residence is the Ambadi Kovilagam. Like the other Rajahships and Kovilagams, her own income, Malikhana allowance from Government, and establishment are distinct and under separate management.

"It is obvious from these arrangements that, although all are originally of the same stock, an impassable line of distinction has been drawn between the interests of each branch of the family and the interests of such members of these families who may in after life respectively succeed to the Rajahships. The one can exercise no control over the acts of the other, and, where there is no control, there can be no lawful responsibility."

The final decision was that the defendants were liable only to the extent of the assets, real or personal, which could be proved to have been acquired from the estate of the deceased Munalpad, or third Rajah.

In 1855 Mr. Holloway, as Subordinate Judge of Calicut, had before him a case in which it was sought to recover a bond-debt incurred by a previous Sthani, either from

the successor to the Sthanam or from the head of the debtor's family. The Judgment is as follows:—

"I consider the first defendant, as possessor of the Sthanam property, responsible for the debt only so far as it was contracted for the benefit of that property, but the real difficulty is in determining whether proof of the application of the money borrowed is on the plaintiff or upon the first defendant. Where money is borrowed by the possessor of the Sthanam, should it be presumed that the loan is for the benefit of the Sthanam until the contrary is proved, or should it be upon the lender, when seeking to enforce an obligation against the borrower's representatives, to show that the loan was really for the use of the Sthanam and that its present holder enjoys its fruits? In the case of a Karnavan of a tarwad contracting a loan, the presumption is undoubtedly that it was for the family benefit. He is the representative of the family and the protector of all its subordinate members, but it appears to me that the case of a Sthanam is different. During the life of the holder, the subordinate members have no right or interest therein, but upon his decease, it passes to the next senior member. I am of opinion, therefore, that it lies upon those who have lent money to show that, in consequence of its having been expended for the benefit of the Sthanam property, the present inheritor of that property is liable for its liquidation. The lender, clearly knowing the risk run in such transactions with men whose rights are of this character, will have no right to complain."

The Judgment then proceeded to hold that the first defendant was liable for the amount, which was found to have been *boná fide* expended for the repair of a choultry, and that the second defendant, who was found to have received arrears of Malikhana due to the previous Sthani, was liable for the balance (*a*).

And again in 1855 in a suit for a bond-debt incurred by a previous Sthani, Mr. Holloway, as Sub-Judge, held as follows:—

"The case of a Sthanam differs much from that of a Tarwad, and the circumstances of the case require the onus of

(*a*) Zillah Decisions, Calicut Sub-Court, November 1855, p. 17.

proving a liability to have been incurred on behalf of a Sthanam by the deceased holder to be laid on him who asserts it. Moreover, I am of opinion that the purpose must be such as tends to increase to improve or conserve the material property of the Sthanam, and that a benefit to the living member is not such an occasion as justifies a loan. Whatever the advantages of a pilgrimage, it is quite clear that it must be individual and not of much benefit to the successor (*a*)."

In a case before Mr. Wigram, as District Judge of South Malabar, in 1882 it was sought to hold the then senior Rajah of Palghat liable for a debt incurred by his predecessor. He dealt with the question thus :—

"The short question is whether a Malabar Rajah is liable for the simple debts *bonâ fide* incurred by his predecessor. As pointed out by Mr. Mayne, in his work on Hindu Law, the liability of one person to pay debts contracted by another arises from three completely different sources which must be carefully distinguished. These are, first, the religious duty of discharging the debtor from the sin of his debts; secondly, the moral duty of paying a debt contracted by one whose assets have passed into the possession of another; thirdly, the legal duty of paying a debt contracted by one person as the agent, express or implied, of another. Cases may often occur in which more than one of these grounds of liability are found co-existing, but any one is sufficient (*b*). In the present case, we are only concerned with the moral duty, and, if first defendant derived no assets, he cannot be held responsible.

"The position of senior Rajah, or second, or third Rajah in a Malabar Royal family is a peculiar one. He succeeds to the Sthanam or dignity by seniority. Certain lands are set apart for the maintenance of the dignity and in addition he receives a Government Malikhana. He has an absolute right to the income, but cannot alienate the corpus of the estate except under special circumstances. Accumulations made by one Rajah, if undisposed of in his lifetime, do not pass to his

(*a*) A. S. 43 of 1855, Zillah Decisions, Calicut Sub-Court, February 1850, p. 16.

(*b*) Mayne's Hindu Law, 6th edition, p. 376.

successor but to his Edam, and, in the Palghat family, it is usually the case that a Rajah who succeeds to one of the dignities is little better than a pauper, and that his first act is to borrow. If he borrows on the security of his Sthanam property, the secured creditor has this advantage, that, when he sues for his money, he is entitled to an issue whether the debt is binding on the Sthanam. If he contracts a simple debt, the unsecured creditor can only be held to have given him a personal credit.

"Even in the case of a Zamindar or Poligar, it has been held that *primâ facie* the money he borrows, except on the mortgage of the estate, is raised on his own personal credit for his own benefit and purposes and not on the credit of the family estate or for the purposes or benefit of the family. The case of a Zamindar is complicated by his being at once proprietor of the estate and head of an undivided family. The case of a Rajah is simple, as, when he succeeds to the Sthanam or dignity of Rajah, he renounces his position in the Edam or family to which he belongs. His estate is analogous to that of a Hindu widow" (*a*).

(*a*) A. S. 193 of 1882, District Court, South Malabar.

CHAPTER XVIII.

TEMPLES.

There are said to be four classes of temples in Malabar, *viz.* :

(*a*) Ancient temples alleged to have been founded by Parasu Rama.

(*b*) Temples founded by the Rajahs.

(*c*) Temples founded by village communities or individuals.

(*d*) Temples founded by devotees from alms received.

In the language of the people, the manager of a temple of the first two classes is said to be subordinate to the temple, whilst, in the last two classes, the temple is said to be subordinate to the manager.

The general superintendence of all endowments is vested in the Sovereign and is termed Melkoyima. When the sovereign power of Malabar Rajahs ceased to exist, the Melkoyima was allowed to fall into abeyance and it has not been exercised by the British Government. The chief offices in the temple are termed Uraima, Samudayam, Karaima, Shanti, and Pattamali. The Devasam is a corporation sole and acts through its Uralans or managers. If there is a difference of opinion among the Uralans, the will of the majority prevails. The ownership of the property of the Devasam is vested in the Uralans, and the Devasam can sue and be sued only in the

name of its Uralans (*a*). The Uralans have no authority to alienate trust property, but they may create subordinate tenures, in accordance with local usage, and raise encumbrances, if money is *bonâ fide* required for the purposes of the Devasam. The Uralans have no authority to transfer their office and its duties together with the trust property to a stranger.

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The Melkoyima right is thus defined by Mr. Holloway in A. S. 118 of 1861 (Tellicherry) :—

"This is not only not the same, but is absolutely incompatible with ownership. It was the right of the sovereign power possessed over property of which the legal ownership was in others That sovereign power and the right of interference, which nothing can prevent these Malabar Rajahs from attempting, have of course wholly ceased. That the Rajah has been entered in the account as the appointor of the people exercising authority is explicable upon precisely the same ground. Doubtless, at the period at which these trustees were appointed, he would at his pleasure not only have appointed but also removed any person who displeased him."

In A. S. 501 of 1876 (South Malabar), Mr. Wigram described the Melkoyima as follows :—

"The Melkoyima is nothing more than the right, which Hindus and Muhammadans alike admit, of the ruling power to interfere in the case of disputes or fraudulent practices occurring, a right which the British Government virtually assumed when they enacted Regulation VII of 1817."

As to this expression of opinion it may be observed that, granting that the Board of Revenue was empowered by

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(*a*) P. K. Uni Nambiar *v.* C. M. Nilakandan Bhattathiripad, I. L. R., IV Madras, 141.

this Regulation to exercise control over religious institutions in Malabar, yet in practice they never were so interfered with. In 1841 Mr. Conolly, the Collector of Malabar, in reporting to the Board regarding the temples in the district, pointed out that the pagodas of Malabar generally are and have always been independent of Government interference. In Ittuni Panikkar *v.* Irani Nambudripad an application was made to the District Judge of South Malabar to appoint a person to be Uralan of a Devasam under s. 5 of Act XX of 1863. The District Judge (Mr. Wigram) was of opinion that he could make the appointment and observed as follows :—

"The right of the Sovereign to superintend all religious endowments has always been recognized in Malabar. Before the British occupation, each Rajah or petty chieftain exercised what was called the Melkoyima right.

"The British Government succeeded to such rights and passed Regulation VII of 1817, the preamble of which recites that it is the duty of the Government to provide that all endowments be applied according to the real intent and will of the grantor. The reports called for under s. 9 of that Regulation were never submitted from this district.

"On 23rd December 1817, the Collector, (Mr. Vaughan), recommended the suspension of the Regulation in this district, as all the temples were private endowments.

"Some further correspondence took place in 1841, when the Collector was instructed to hand over the temples to private individuals. Mr. Conolly then reported that the only temples under Government management were those that had escheated from the Betuth Rajah and the Chenat Nayar.

"The management of the Devasams belonging to the former was made over to the Zamorin Rajah, and the management of the latter to the Palghat Rajah.

"The Collector also interfered in the case of two other Devasams, regarding which there were disputes between two Rajahs, and made them over to the Zamorin Rajah.

"When Act XX of 1863 was passed, the Collector had

long ceased to interfere with the Devasams. Disputes between rival claimants had been litigated in the Courts from time to time, and a general impression prevailed that Act XX of 1863 was not intended to apply to Malabar.

"I am of opinion that the impression was erroneous. The Act divides all religious establishments into those in which the nomination of the trustee, manager, etc., is vested in Government (s. 3) and those in which it is not so vested (s. 4).

"All the Devasams in Malabar fell under s. 4, and ss. 5 and 6 are applicable to the trustees or managers thereof. There was no occasion to make formal delivery of any property under s. 4, because the property was already in the hands of the trustees. As the trusteeships are almost invariably hereditary, there would be no occasion to resort to s. 5, unless the family of the trustees became extinct, as here. But even with this limited application of the Act, much litigation might have been avoided."

The High Court (Innes and Tarrant, JJ.), however, on appeal, pointed out, in the following judgment, that, as the institution to which the application related had never been controlled by the Board of Revenue under the provisions of Regulation VII of 1817, and had never been transferred under s. 4 of Act XX of 1863, the District Judge had no jurisdiction to make an appointment:—

"The order of the District Judge is made under a supposed discretion, vested in him under s. 5 of Act XX of 1863. On referring to that section, however, we find that it relates exclusively to cases in which the vacancy has occurred, and the dispute arises in respect of a religious institution which had been taken under the control of the Board of Revenue, under the provisions of Regulation VII of 1817, and, after the passing of Act XX of 1863, had been transferred to the hereditary trustee, manager or superintendent, in accordance with the provisions of s. 4 of Act XX of 1863.

"It is conceded that the District Judge is right in saying that this particular institution was never taken under the control of the Board of Revenue, but remained under the management of the trustee, manager or superintendent, appointed from time to time, according to the custom of the institution, and was not transferred under the provisions of s. 4 of the Act.

"It is contended that, if the Board of Revenue did not, they ought to have exercised control over this and other religious institutions in Malabar, and that, though this institution was not transferred, we should regard it as having been transferred, as, by so doing, we should carry out the intention of the Act. The Act no doubt was intended to embrace all religious institutions over which the Board of Revenue had formerly a power of control, and it was probably, therefore, the design of the framers of the Act to embrace in its provisions this and other institutions similarly situated. But in the particular question before us, we must hold that this institution is not within the language of s. 5 of the Act, and that, if the Legislature intended that the provisions of s. 5 should apply to institutions which had not been transferred in accordance with s. 4 as well as to those which had been so transferred, it has not expressed what it intended. We cannot give effect to the Act beyond the expressed intention which confines the operation of s. 5 to cases in which the property has been transferred. We must hold that the Judge had no jurisdiction under the section to pass the order, and must set it aside" (*a*).

The question, as to whether what was a Melkoyima right when sovereign power was exercised by a Malabar Rajah became on the introduction of British rule a Uraima right, and, if so, what was the exact nature of such right has come before the High Court in two important cases. In Zamorin of Calicut *v.* Krishnan, the plaintiff, whose ancestors, it was admitted, as rulers of Malabar had held a Melkoyima right over the Guruvayur temple, brought a suit to have it declared that he had a Uraima right over the institution. In discussing the question, as to whether the Melkoyima right had been converted into a Uraima right, their Lordships (Muttusami Aiyar and Parker, JJ.) observe as follows :—

"Assuming that the Zamorin's present right is historically a continuation of the Melkoyima which his ancestors had over

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(*a*) I. L. R., III Madras, 401.

the Devasam as *de facto* sovereigns, the Judge very properly declined to accept it as sufficient for setting aside the usage of the institution during the last eighty years. The respondent's pleader argues that the original trusts of the institution ought not to be varied by transforming the sovereign power of supervision into a joint Uraima right. But it has been ruled by the Privy Council that the right of management is personal to the Uralan and may be barred as such by the law of limitation. In Balwant Rao Bishwant Chandra Chor *v.* Purun Mal Chaube (*a*), the Judicial Committee say, 'Here there is no question of recovering the property for the trusts in question (of a Hindu temple) ; but the plaintiff is suing only for his personal right to manage or in some way to control the management of the endowment.' Again, Mr. Conolly, the Collector of Malabar, described in his report to the Board of Revenue the ancient constitution of Devasams generally in Malabar. He said, 'The pagodas of Malabar generally are, and have always been independent of Government interference. They are either the property of some influential family, the ancestors of which either built and endowed them, or, as is more commonly the case, are claimed and managed by a body of trustees (Uralans) who derive their right from immemorial inheritance and who conduct the affairs of the temple under the patronage and superintendence of some Rajah or other person of consideration. This latter state of things, it will be seen, is nearly that which the Government are now desirous of introducing everywhere. If we are now at liberty to speculate in what form the Melkoyima was exercised when the Zamorins were *de facto* sovereigns, the passage cited above affords ground for the belief that it was probably not limited to a passive supervision in the sense in which we now understand the sovereign right of control, but that it extended to active participation in management in the capacity of a superior and superintending trustee. Having again regard to the spirit in which Hindu sovereigns identified themselves with important temples in their territory and to the mode in which the British Government itself exercised superintendence over Hindu temples on this side of the Ghâts under Regulation VII of 1817, prior to its withdrawal from direct

(*a*) L. R., XI. A., 90.

interference in the management of religious institutions and to the establishment of Devastanam Amins, Peshkars and Manigars organized for the purpose of exercising supervision and control with efficiency, we do not think it is too much to say that, when the ruler of the country was also a superintending trustee, he appointed agents and Samudayis and acted practically as a trustee having a superior position in relation to the local Uralan. Further, the allusion to non-interference on the part of the British Government under Regulation VII of 1817 with Hindu temples in Malabar and the continuation of the power of supervision which the Zamorin exercised when he was sovereign after he become a subject, without any protest from the ancestors of the Nambudri, affords a ground for the belief that the prior state of things as regards this temple was continued with the tacit approval of the Government in the interest of the institution and as part of its constitution in ancient times. This appears to evidence, not a delegation by the British Government of the sovereign power of control to the Zamorin in a passive sense as argued for the respondents, but a tacit recognition of the ancient *status* of the Zamorin as a superintending trustee and as part of the original constitution of the temple. We do not, however, desire to speculate, without cogent and tangible evidence, as to the original constitution of the temple or the form in which the Melkoyima was exercised by former Zamorins or the connection between it and the appellant's Uraima right, but we are content to rest our decision on the safer basis of long usage established by the evidence. Their Lordships of the Privy Council say, in Greedharee Doss *v.* Nundokissore Doss (*a*), that the only law to be applied in institutions like these is to be found in custom and practice which are to be proved by testimony" (*b*).

Nilakandhen *v.* Padmanabha Revi Varma was a suit brought for a declaration that the plaintiffs' families, as hereditary Uralans of a Devasam in Malabar, were entitled to the exclusive management of its affairs and that the defendants' family, which formerly possessed a Melkoyima right over it, was entitled to no rights of management,

(*a*) XI Moore's Indian Appeals, 405. (*b*) R. A., 35 of 1887, H. C.

their Melkoyima right having been extinguished on the British conquest. In their decision, the Judges (Muttusami Aiyar and Best, JJ.) quote the remarks of Mr. Conolly already referred to, and then observe as follows :—

" It will be seen that the above passage throws light also on the policy which the British Government was inclined to adopt, *viz.*, that of continuing the supervision of the Rajah, who was the patron, as it originally existed in the interests of certain temples, instead of referring that supervision solely to the *status* of the person exercising it as sovereign for the time being and declaring it to have ceased on the annexation of Malabar. There is some indication of such policy having been pursued in this case, as in the Guruvayur Devasam case (Zamorin of Calicut *v.* Krishnan) (*a*), for the Revenue authorities have corresponded with the Nambidi relating to matters connected with the temple, whilst there are traces of the continuance of the right of interference by the Nambidi family subsequent to the annexation of Malabar. The real question then, which we have to decide, is this, are we to ignore the state of things which has existed admittedly from 1845, and probably from the commencement of the century, and which was submitted to by the Uralans as one consistent with the ancient usage and constitution of the institution and continued and countenanced by the British Government as conducive to the protection of the interests of the institution, and, are we now to deduce a rule of decision from the abstract theory of Melkoyima as it existed prior to British rule, and to change the usage and unsettle what was set at rest by a compromise forty years ago? We have no hesitation in answering the question in the negative. In cases in which there is a conflict between an ancient theory and the modern usage in a religious institution, Courts of Justice must see whether the usage is referable to some other legal origin with reference to the facts of each case, if not to the ancient theory. As observed by the Judicial Committee in the Ramnad case (Collector of Madura *v.* Mootoo Ramalinga Sathupathy) (*b*), with reference to a theory deduced from the ancient Hindu Law of

(*a*) R. A., 35 of 1887, H. C.

(*b*) XII Moore's Indian Appeals, 397.

Niyoga or appointment in connection with the law of adoption, the abstract theory has a juridical value for the purpose of explaining and upholding the existing usage and not for the purpose of ignoring it. It is then urged for the appellants that the joint enjoyment, however long, can be referred to no legal origin. But it must be observed that, from what has been stated above, such legal origin may be found in the continuance of what was Melkoyima in ancient times as a co-trusteeship subsequent to the British rule with the tacit sanction of the British Government, or in the *status* of the Nambidi family as patrons of the institution as part of its ancient constitution, a *status* which did not cease on the introduction of the British rule" (*a*).

This decision was confirmed on appeal by the Judicial Committee of the Privy Council with the following remarks:—

"Their Lordships are of opinion that the state of things, which has admittedly continued since 1845, and which was probably the state existing before that time and since the establishment of British sovereignty, cannot now be questioned, and that the compromise of their rights entered into, in 1845 and 1874, by the Uralans and Nambidi is binding upon them and their successors, and cannot be now reopened upon any theory of the extent of the Melkoyima right in the abstract. The usage which has existed for so long a period is the best exponent of the Melkoyima right vested in the respondents, a right twice acquiesced in by the appellants or their predecessors in legal proceedings in which the opportunity was afforded of a definite decision as to the rights of the respective families" (*b*).

(2) The chief offices in a temple are termed Uraima, Samudayam, Karaima, Shanti, Pattamali.

The Uraima originally denoted the right of the heads of the village community to regulate the affairs of the village temple. It was subsequently applied to those who founded temples and constituted themselves managers, and to those who were appointed as managers of temples by the Rajahs.

(*a*) I. L. R., XIV Madras, 153.

(*b*) I. L. R., XVIII Madras, 1. S. C.; L. R., XXI; I. A., 128.

The Uraima is invariably vested in families and is hereditary. It is exercised by the head of the family. When the family owing the Uraima becomes extinct, the right of nominating a fresh trustee is with the sovereign.

The Temple Paimash accounts of 1822 form an official record of the families then entitled to the Uraima of the temples, but they cannot be regarded as conclusive evidence on the subject. Many changes have taken place since those accounts were prepared. New trustees have been admitted with the consent of the general body of trustees, and actual possession of a Devasam and its properties for more than twelve years will probably be held to confer a possessory, if not a proprietary, title to the Uraima.

In A. S. 118 of 1861 (Tellicherry), Mr. Holloway appears to have been of opinion that the whole body of trustees may add to their numbers. And in A. S. 240 of 1880 (North Malabar), the Sub-Judge upheld the introduction of a new Uralan with the consent of a majority of the whole body. But in S. A. 579 of 1881, the High Court held that the act was *ultra vires.*

The Samudayam was originally the committee of management who managed on behalf of the body of Uralans. Sometimes the management was vested in a single Uralan who became Samudayi. The term subsequently came to be applied to any person appointed as an agent of the Uralans. Sometimes the office was hereditary. A Samudayi who is himself an Uralan stands on a higher footing than one who is a mere agent. His powers will of course depend upon the terms of his appointment. Mr. Holloway, when in Malabar, waged a fierce war against the Samudayis, some of whom set up a title independent of the Uralans, and invariably treated them as agents liable to dismissal by the Uralans or a majority of them. As an instance, the case reported in Zillah Decisions, Calicut Sub-Court, December 1856, p. 25, may be referred to.

The High Court, following Mr. Holloway, have invariably treated the Samudayi as a mere agent. Reference may be made to Rama Varar *v.* Krishnan Nambudri, where a Samudayi brought a suit on behalf of a temple to redeem a mortgage. It was objected by one of the defendants that the suit should have been brought in the name of the Uralans and not in the name of their agent, the Samudayi. The High Court (Kindersley and Forbes, JJ.) allowed the objection and dismissed the suit (*a*).

Any temple servant who possesses an hereditary right to perform any particular service in a temple is said to have a Karaima right. Such a servant is only liable to removal for proved misconduct (*b*).

In O. S. 1 of 1860 (Tellicherry), Mr. Holloway says:—

"The office of Karalan is as well understood as anything can be. It entitles the holder to the performance of certain services in the Pagoda to which he is attached."

The Shanti is the priest or worshipper of the temple and usually holds office for one year during which time he must reside within the precincts of the temple. He is remunerated by wages and certain perquisites.

The Pattamali is the rent collector and is usually a mere paid servant of the Uralans, but his office is sometimes hereditary.

(3) The Devasam is a corporation sole and acts through its Uralans or managers. If there is a difference of opinion among the Uralans, the will of the majority prevails.

In A. S. 36 and 37 of 1862 (Tellicherry), Mr. Holloway thus describes the position of Uralans:—

"At the period of the execution of the contract the three trustees were in possession with equal powers and equal rights. For certain specified purposes, for a period of three

(*a*) I. L. R., III Madras, 270.

(*b*) Cf. Sudder Decisions, 1854, p. 82 and Kristnaswami Tatachari *v.* Gomatum Rangachari, IV Madras H. C., 63.

years, management with certain restrictions was to reside in third defendant. It is obvious that there was no divesting of possession, and that, at the expiration of the period, the possession and the management returned to their original state. The incidents to such a corporate body are that the majority may, of their own will, do any acts not inconsistent with the design of their original formation. This is a plain rule in every known system of jurisprudence."

In M. Kunjan Menon *v.* Parameshvaren Bhadetu, the District Judge of South Malabar held that, where there were a number of Uralans, the will of the majority must prevail in the management of the temple affairs and this decision was confirmed by the High Court (Turner, C. J., and Innes, J.) on Second Appeal (*a*).

The practice of allowing tenants, in suits of ejectment by the managing Uralan, to collude with another Uralan and oppose the suit, was justly reprehended by Mr. Holloway. In a suit decided by him as Sub-Judge, Calicut, in 1856, he says:—

"The Munsif misapprehended the purport of the objection of the defendants below, that the right of management was in the hands of others as well as of those who authorized the present plaintiff to sue. The object was to show that the plaintiff had no right to sue, that he had no standing place in the Courts. This misapprehension, I am aware, is very widely spread, and, by its general adoption, men are led to believe that, by securing one man of a set of joint managers to their side, they will be enabled to commit any fraud upon the property managed because there will be no means of bringing a suit. It is, however, clear that where acts are necessarily injurious to the common interest of a large number of persons, a few of them may institute a suit for relief on behalf of themselves and the rest, although the majority approve of those acts and disapprove of the institution of the suit. A tide of authorities might be quoted for this position. Any other doctrine would of course be productive of the most monstrous consequences.

(*a*) S. A. 128 of 1879, H. C.

This case clearly falls within the rule. The object of the managers of the Devasam is to set aside a claim to the land which is part of the property of the Devasam, and to procure its return from a mortgagee who has violated his covenant and to recover balance of rent. This is clearly the interest of the whole body as managers of the Devasam" (*a*).

And again in 1857, Mr. Holloway, as Sub-Judge, Calicut, held that any act, plainly for the advantage of the objects of a trust, may be performed by even one of the trustees against the wish of all the others (*b*).

(4) The Devasam can sue and be sued only in the name of its Uralans.

It was formerly the practice to allow the Samudayi to sue on behalf of the Devasam and the High Court appear to have recognised the practice in Hari Dassen Chomadiri *v.* Govinda Puduval (Scotland, C. J., and Innes, J.) and Mapally Kubaren *v.* Ettisari Edathil Ambu (Morgan, C. J., and Kindersley, J.) (*c*). In the latter suit the right of the Samudayi to sue was strongly contested before the District Judge (Mr. Reid) who decided in his favour. On appeal to the High Court the point was again raised but the objection was overruled and the appeal dismissed.

In Sreedharen Embrandri *v.* Thikal Kannan (*d*) the High Court (Morgan, C. J., and Kindersley, J.) held that the question whether a Samudayi could sue was not in any way dependent on s. 17 of Act VIII of 1859 and observed :—

"The question is not whether there exists a recognized agent within the meaning of the section, but whether the right of suit resides, the particular circumstances of the case being considered, in the manager (Samudayi) or the Uralans. Ordinarily the principal, as the person who is owner

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(*a*) Zillah Decisions, Calicut Sub-Court, May 1856, p. 5, A. S. 301 and 302 of 1855.

(*b*) Zillah Decisions, Calicut Sub-Court, July 1857, p. 150, A. S. 378 of 1855.

(*c*) S. A. 105 of 1870 and S. A. 367 of 1875, H. C.

(*d*) S. A. 286 of 1877, H. C.

or has the beneficial interest, should sue and not one who is merely an agent or servant. In some cases an agent or manager may have such an interest or may so contract that he may bring a suit in his own name. Here the suit was by the manager who had himself let the lands by a writing in which he is so described. A question as to his authority having been raised in the Courts of first instance, the Uralans were called and they deposed to the plaintiff's authority to bring the suit * * * The suit would probably have been more correctly framed if the Uralans had originally been made parties."

This was followed by Rama Varadi *v.* Krishnen Nambudri (*a*) (Kindersley and Forbes, JJ.), in which it was held that the objection, that the suit should have been brought in the name of the Uralans or trustees and not in the name of the Samudayi, was well founded, and that the defect was not cured by the plaintiff holding an authority from persons who were not parties to the suit.

Again in Kunjunneri Nambiar *v.* Nilakunden, the High Court (Kernan and Forbes, JJ.) held that the Uralans are the persons in whom the estate and property of the temple is vested, and that the plaintiff, who termed himself a Karaima Samudayi, was an agent accountable to the Uralans and subject to be dismissed by them for misconduct (*b*).

And lastly, in Patinharipat Krishnan Unni Nambiar *v.* Chekur Manakkal Nilakandan Bhattathiripad, the High Court (Turner, C. J., and Innes, J.) decided that a suit could not be maintained by a Karaima Samudayi. Mr. Justice Innes, says:—

"The status of a Karaima Samudayi, put at the highest, is merely that of an agent or manager who has a proprietary and hereditary right in his office. The question of whether he can conduct suits in his sole name on behalf of the Devasam is one of procedure."

(*a*) S. A. 92 of 1880, H. C.
(*b*) I. L. R., II Madras, 167.

Turner, C. J., was of opinion that the suit could not be maintained by the Samudayi and in dismissing it observed as follows :—

"The ownership of the trust property is vested in the Uralans, and it is in their names that proceedings should ordinarily be taken to recover possession of any portion of the estate from a person whose right to occupy it has expired.

"The powers of the Samudayi are confined to the management of the estate. When occasion requires that resort should be had to the Courts, he should apply to the Uralans to lend their names. If they improperly refuse their assistance to the Samudayi to enable him to discharge his duties, they may be compelled to afford it.

"It is the practice in India to implead as defendants persons who should properly be made parties as plaintiffs, but who have refused to concur in a suit, and I am not prepared to say that a suit by a Samudayi, for the recovery of land from the holder of a kanam, would not be maintainable, if the Samudayi showed that he had applied to the Uralans to bring the suit and that they had improperly refused to do so" (*a*).

With reference to the observations of Mr. Justice Innes, Mr. Wigram points out that there is nothing in the etymology of the word Samudayam to import agency. The word primarily means an assembly, a council of Brahmans, a committee for managing common property or the concerns of a temple (*b*). At the same time, it cannot be denied that the Samudayi is in many instances an agent of the Uralans. When the office is occupied by one of the Uralans themselves, it is possible that the question of his right to represent the Devasam may rest on different grounds.

In A. S. 114 of 1882 (South Malabar), Mr. Wigram held that one Uralan sufficiently represented the Devasam. He said :—

"There is a long current of decisions to that effect in this

(*a*) I. L. R., IV Madras, 141.

(*b*) *Vide* Gundert's Malayalam Dictionary, *Sub voce*.

and the Subordinate Courts. These decisions may be justified on the ground of convenience, which was the *ratio decidendi* in Shikhanti Narayanappa *v.* Indupuram Ramalingam (*a*) and is the principle on which a karnavan is allowed to represent the tarwad, or on the ground that among a body of trustees there is no objection to the delegation of the trust to one of such trustees. The case of a Samudayi, who is merely an agent of the Uralans, stands on a different footing. * * * Again, there is, it seems to me, a distinction between a Sabha or College and a Devasam. In Kanna Pisharody *v.* Narayana Somayajipad (*b*), the High Court decided that the Committee of the Sabha had no *locus standi*, and that all co-owners of property must join in a suit to recover such property."

The question came again before Mr. Wigrám, in A. S. 246 of 1882 (South Malabar) from the Judgment in which the following passage is extracted :—

"It has been my constant endeavour to reduce, as far as possible, the constant dissensions among Uralans, which are at once degrading to the good sense of respectable people and ruinous to the trust property which they represent. With this end in view, I have again and again held that one Uralan sufficiently represents the Devasam in suits when a majority concur in vesting him with the powers of management. * * * I shall regret exceedingly if the High Court decisions render it imperative for every Uralan to become a party to the suit when suits are brought on behalf of a Devasam. I am convinced that such a rule would tend to promote internal dissension and, as so often happens now, one Uralan will side with the tenant for the purpose of resisting his co-Uralan."

In quoting the above passage in the first edition of this book, Mr. Wigram adds :—

"If the Uralans are in future to be treated as legal co-owners of the Devasam, it will be necessary that all of them should join in conducting suits on behalf of the Devasam."

(*a*) III Madras H. C., 226.
(*b*) I. L. R., III Madras, 234.

In Parameswaran *v.* Shangaran the plaintiff and 1st defendant were co-Uralans of a Devasam. The plaintiff sued to recover certain property belonging to the Devasam, held on a lease, without joining the first defendant as co-plaintiff or consulting him as to the advisability of bringing the suit. The District Munsif gave the plaintiff a decree, but the District Judge, on the authority of Patinharipat Krishnan Unni Nambiar *v.* Chekur Manakkal Nilakandan Bhattathiripad (*a*), held that the suit was bad for non-joinder of the first defendant as plaintiff and the High Court (Muttusami Aiyar, Officiating C. J., and Shephard, J.) dismissed the second appeal, observing that the first defendant as a co-Uralan was entitled to be consulted and to be joined as a plaintiff (*b*). This decision was followed in Purumathan Somayajipad *v.* Sankara Menon, the facts of which were as follows. A temple was managed by three Sabhas and a suit to recover temple property was brought to redeem a kanam by certain members representing two Sabhas only, there being no allegation that the other Sabha had been consulted or had repudiated the right of the plaintiffs to sue in conjunction with itself. The High Court (Moore and O'Farrell, JJ.) held that the plaintiffs were not competent to bring the suit and observed :—

"The subsequent making of all the members defendants will not, in our opinion, cure the defect. To hold that it would do so would be to countenance the very evil struck at by such decisions as the one we have quoted (*b*) and allow a small minority of the governing body to dispute the acts of the majority and plunge the institution into litigation whenever they thought fit" (*c*).

The procedure now usually adopted is as follows. Such of the Uralans as wish to institute a suit intimate the fact to their co-Uralans and if possible get them all to join. If, however, this cannot be done, those who are unwilling to

(*a*) I. L. R., IV Madras, 141. (*b*) I. L. R., XIV Madras, 489.
(*c*) I. L. R., XXIII Madras, 82.

be brought in as plaintiffs are added as defendants. This appears to be the safest course to follow so as to avoid questions as to non-joinder being raised in appeal.

In a case decided in 1900 (Savitri Antarjanam *v.* Raman Nambudri) the High Court (Shephard and Boddam, JJ.) insisted on the necessity of a Uralan being asked to join as a plaintiff before he was impleaded as a defendant. The learned judges observe that the Subordinate Judge had found that it was unnecessary for the plaintiff to ask certain of the defendants who were his co-Uralans to join him in bringing the suit as they had denied his title and add :—

"We cannot agree with this opinion. If one Uralan whose title is denied by the other may bring suits and do other acts without consulting his fellow Uralan, he is virtually constituting himself sole Uralan, whereas it is clear law that two co-Uralans must act jointly. It is only when one perversely declines to co-operate with the other, after being invited to do so, and when it is for the benefit of the institution, that proceedings should be taken that one Uralan can sue, impleading the other as defendant" (*a*).

In a still more recent case, however, (Mariyil Raman Nayar *v.* Narayanan Nambudripad) (*b*), the High Court (Bhashyam Ayyangar and Moore, JJ.) expressed doubts as to whether Savitri Antarjanam *v.* Raman Nambudri (*a*) had been rightly decided and observed that, if it had not been that the case then before them could be distinguished from the earlier case, they would have felt it necessary to refer the question to a Full Bench. A few months subsequently the same question came before another Bench of the High Court and was referred to a Full Bench in the following terms :—

"Whether one of two co-Uralans, without averring in the plaint that the other Uralan was asked to join the former as co-plaintiff and that he refused to do so, may bring a suit to

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(*a*) I. L. R., XXIV Madras, 296. (*b*) I. L. R., XXVI Madras, 461.

redeem a mortgage made by the predecessors in title of the two Uralans the other Uralan being made party-defendant along with the mortgagees." The following was the opinion recorded by the Full Bench (Subramaniya Ayyar, Davies and Boddam, JJ.).

"We are of opinion that the answer to the question referred must be that one of two co-Uralans may bring a suit to redeem a mortgage without averring or proving that the other Uralan was asked to join as plaintiff in the suit. It would be impossible to hold otherwise in the face of ss. 91 and 85 of the Transfer of Property Act. These sections were apparently not considered when Savitri Antarjanam *v.* Raman Nambudri (*a*) was decided (*b*)."

It will be remarked that this decision is based on certain provisions of the Transfer of Property Act relating to mortgages and that the principle laid down in Parameswaram *v.* Shangaran (*c*), Puramathan Somayajipad *v.* Sankara Menon (*d*) and Savitri Antarjanam *v.* Raman Numbudri (*e*) must therefore be considered to hold good in the case of all suits brought by Uralans, other than suits to redeem mortgages.

In Kanna Pisharody *v.* Narayanan Somayajipad, the High Court (Turner, C. J., and Kindersley, J.) held as follows:—

"Unless where, by a special provision of law, co-owners are permitted to sue through some or one of their members, all co-owners must join a suit to recover their property. Co-owners may agree that their property shall be managed and legal proceedings conducted by some or one of their number, but they cannot invest such person or persons with a competency to sue in his own name on their behalf, or, if sued, to represent them. It may indeed happen that a suit by one of several co-owners can be successfully maintained against a tenant. This

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(*a*) I. L. R., XXIV Madras, 296.

(*b*) Edamana *v.* Unni Kannan, I. L. R., XXVI Madras, 649.

(*c*) I. L. R., XIV Madras, 489. (*d*) I. L. R., XXIII Madras, 82.

(*e*) I. L. R., XXIV Madras, 296.

is the case when the tenant has dealt with such co-owner as sole landlord, and by so dealing is estopped from denying the title of the person who has let him into possession" (*a*).

(5) The Uralans have no right to alienate trust property, but they may create subordinate tenures in accordance with local usage.

As to the general question, reference may be made to two cases in the Privy Council, Prosunno Kumari Debya *v.* Golab Chand Baboo (*b*) and Konwur Doorganath Roy *v.* Ram Chunder Sen (*c*). In the former of these cases it was held that, notwithstanding that property devoted to religious purposes is as a rule inalienable, it is competent for a manager to incur debts and borrow money for its service of the idol and preservation of its property to the extent to which there is an existing necessity for so doing.

The leading case in the Sudder Court is Erumbala Chundu *v.* Coomery Chatu (*d*), in which the Court observed :—

"It is clear that, as the first defendant was not sole Uralan and manager of the pagoda in question, his having alone mortgaged the pagoda lands and recovered the mortgage amount from the plaintiff without the knowledge and consent of the other Uralans was illegal, although, had the transaction taken place with their consent and for the benefit of the pagoda, such temporary transfer of the lands to the plaintiff could not have been objectionable as contrary to the Regulation (VII of 1817)."

In Chapunni *v.* Itiachi, however, the Sudder Court appear to have drawn a distinction between public and private Devasams and to have held that, by the custom of Malabar, the lands attached to a family pagoda are alienable as any other private possession (*e*).

When, as frequently happens, mortgages are created by Uralans in favour of members of their own families, that

(*a*) I. L. R., III Madras, 234.
(*b*) L. R., II I. A., 145.
(*c*) L. R., IV I. A., 52.
(*d*) S. A. 10 of 1847, Sudder Decisions.
(*e*) R. A. 64 of 1861, Sudder Decisions, 1862, p. 90.

circumstance alone is strong presumptive evidence of fraud (*a*).

(6) The Uralans have no authority to transfer their office and its duties together with the trust property to a stranger.

This matter is fully dealt with in an appeal before the Privy Council where the question at issue was as to whether the Uralans of the Tracharamana Pagoda could lawfully alienate to the Chirakkal Rajah the right to manage the pagoda (*b*). In their Judgment their Lordships observe as follows :—

"It is admitted that according to the constitution of the institution the Uralans for the time being were to be the karnavans or chief members of four different tarwads. It was, therefore, presumably the intention of the founder that the Uraima right should be exercised by four persons representing four distinct families.

"The first question is, whether, independently of custom, persons holding such a trust are capable of transferring it at their own will. No authority has been laid before their Lordships to establish this proposition ; principle and reason seem to be strongly opposed to such a power, and particularly to such an exercise of it as has taken place in this instance. The unknown founder may be supposed to have established this species of corporation with the distinct object of securing the due performance of the worship and the due administration of the property by the instrumentality and at the discretion of four persons capable of deliberating and bound to deliberate together ; he may also have considered it essential that those four persons should be the heads of particular families resident in a particular district, open to the public opinion of that district, and having that sort of family interest in the maintenance of this religious worship which would insure its due performance. It seems very unreasonable to suppose that the founder of such a corporation ever intended to empower the four trustees of his creation at their mere will to

(*a*) Cf. Printed papers in Krishnan Pisharodi *v.* Valia Rajah of Cherakal Kovilagam, S. A. 339 of 1881, H. C.

(*b*) The decision of the Madras High Court is reported at VII Madras H. C., 210.

transfer their office and its duties, with all the property of the trust, to a single individual who might act according to his sole discretion, and might have no connection with the families from which the trustees were to be taken. Such a transferee might be a powerful man, as probably this Chirakkal Rajah is, and, therefore, the less amenable to public opinion, the less capable of being reached by the Courts, and the more likely to deal with the institution with a high hand.

"Again, the preponderance of the authorities in Madras appears to be against the present contention. The first case, cited from the first volume of Madras High Court Reports (*a*), decided that the assignment in question was not valid, because all the Uralans had not joined in it.

"It cannot be inferred from such a ruling that there was any implied decision, or even, as Mr. Mayne would put it, a dictum in favour of the proposition that an assignment executed by all the Uralans of any foundation of this kind would operate as an effectual transfer of their trust. The Court merely decided on one patent defect of title, without considering whether, if that defect had not existed, the title could have been supported.

"The next case was that before Innes and Collett, JJ. (*b*). That is to some extent in favour of Mr. Mayne's view, though it related to a charitable and not to a religious foundation, and we have not clearly before us what the facts were as to that foundation. That the broad distinction, which the Civil Judge takes between a religious and a charitable foundation, can be supported their Lordships are not prepared to say. Then came the decision of Mr. Justice Holloway when he was Judge of Tellicherry (*c*). It is said that the High Court afterwards remanded this cause for the trial of certain issues as to the alleged rights of the plaintiff, who, it may be observed, was the same person as the plaintiff in the present case. Some of those rights, however, were different from that now asserted. The plaintiff did not there claim, as here, only

(*a*) Ukanda Variyar *v.* Raman Nambudri, 1 Madras H. C., 262.

(*b*) Ragunada Naik *v.* Chinnappa Chetty, 4 Mad. Rev. Reg., 109.

(*c*) *Vide* foot-note I. L. R., I Madras, 235, at p. 240.

under an assignment from certain Uralans. He also set up superior rights to those of the Uralans, claiming a power to remove as well as a power to appoint them. It is not shown to their Lordships' satisfaction that Mr. Justice Holloway's general position in that case was finally or conclusively overruled by the High Court.

"This being the state of the authorities, their Lordships are of opinion that there is no authority binding even on the Court of Madras which is inconsistent with the judgments under appeal; that the general principle affirmed by those judgments is correct. And consequently that the Uralans had no power under what may be termed the common law of India to transfer their Uraima right to the plaintiff, the Chirakkal Rajah."

It had been argued before their Lordships that, in India and particularly in that part of India in which the pagoda with respect to which this suit had been brought was situated, custom must prevail against the general law. Their Lordships proceed to consider the evidence as to custom produced in the case and conclude as follows :—

"Their Lordships are of opinion that no custom which can qualify the general principle of law has been established in this case; and they desire to add that, if the custom set up was one to sanction not merely the transfer of a trusteeship, but as in this case the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law" (*a*).

(*a*) Rajah Vurmah Valia *v.* Ravi Vurmah, I. L. R., I Madras, 235; S. C., L. R., IV I. A., 76, *vide* also Gananasambanda Pandara Sannadhi *v.* Velu Pandaram, I. L. R., XXIII Madras, 271. The decision of the Privy Council in Rajah Vurmah Valia *v.* Ravi Vurmah was followed by the High Court in Rama Varma Tambaran *v.* Raman Nayar, where it was held that a transfer of the right to manage a Malabar temple and its lands by a lease for ninety-six years in consideration of an advance of eight thousand rupees was illegal. I. L. R., V Madras, 89.

APPENDIX.

GLOSSARY.

APPENDIX I.

Allusions to Malabar by ancient writers on geography.

In his introduction to the first edition of this work, Mr. Wigram wrote as follows :—

" The external history of India commences with the Greek invasion in B.C. 327. And if, as is supposed, Pliny's sources of information regarding India were derived from Megasthenes' Indika, we have a description of the Malabar Coast as it existed more than 2,000 years ago. The following passage from Pliny's Natural History seems undoubtedly to refer to Malabar.

" ' Next follow the Nareæ enclosed by the loftiest of Indian mountains, Capitalia. The inhabitants on the other side of this mountain work extensive mines of gold and silver. Next are the Oraturæ, whose king has only ten elephants, though he has a very strong force of infantry. Next again are the Varetatæ, subject to a king who keeps no elephants but trusts entirely to his horse and foot. Then the Odombœræ : the Salabastræ : the Horatæ, who have a fine city defended by marshes, which serve as a ditch wherein crocodiles are kept, which, having a great avidity for human flesh, prevent all access to the city except by a bridge. Another city of theirs is much admired, Automela, which being seated on the coast at the confluence of five rivers, is a noble emporium of trade. The king is master of 1,600 elephants, 150,000 foot and 5,000 cavalry. The poorer king of the Charmæ has but sixty elephants and his force is otherwise insignificant. Next come the Pandæ, the only race in India ruled by women. They say that Hercules having but one daughter, who was on that account all the more beloved, endowed her with a noble kingdom. Her descendants rule over 300 cities and command an army of 150,000 foot and 500 elephants (*a*).'

(*a*) Ancient India as described by Megasthenes and Arrian translated by J. W. McCrindle, Fragment 56 (1877).

"With all respect for General Cunningham, who has attempted to identify the places named in his Geography of Ancient India (*a*), I venture to make the following suggestions. In the Nareæ, have we not a direct reference to the Nayars of Malabar enclosed by the Western Ghauts? Are not the mines of gold and silver the same mines which after 2,000 years English capital is attempting to work in the Wynaad? Are not the Oraturæ the subjects of the Kola King who still retains the ancient name of Kolattiri? His dominions at that time probably comprised the whole of the Tulu country and North Malabar. In the Varetatæ is there not an allusion to the now extinct Varatatta Rajah, whose palace, I am told, was in the neighbourhood of Taliparamba and whose descendants are still living in Travancore? His dominions were at some period or other absorbed by his neighbour, the Kola King.

"May not the Odombœræ represent the Kurumbas of Kurumbranad and the Salabastræ the Vallabhas of Walluvanad? The Kurumbas have disappeared from the coast, but have left their name behind them. They are now to be found in the Wynaad and on the Nilgiri plateau, and it has been suggested that Kadamba may have been a corruption of Kadu-Kurumba. The Walluvanad Rajah is still the Vallabha Rajah (can this have any reference to the Scythic Vallabhis?) His territories formerly comprised the maritime district of Shernad (*b*) and his subjects were the Vallodis of Walluvanad, the Nedungadis of Nedunganad and the Eradis of Ernad.

"In the Horatæ, Charmæ and Pandæ, may we not recognize our old friends Chola, Chera and Pandya? The site of Automela (Ettu Mala or eight hills or perhaps Attu Mala or river hill) must be looked for in the neighbourhood of Cranganore, which was always an important emporium of trade, and in the vicinity of which may be found to this day a village called Annanadi (*i.e.*, Anja-nadi or the five rivers). The site of the crocodile city is perhaps Tripunatara, the ancient residence of the Cochin Rajahs, the Tropina of the ancient historians. The legend of Hercules

(*a*) Geography of Ancient India by General Cunningham, p. 495.
(*b*) Buchanan's Mysore, Canara and Malabar, Vol. II., p. 130.

and his daughter survives to this day in Kanya Kumari or Cape Comorin."

The following notes by Mr. McCrindle on certain of the more important names commented on by Mr. Wigram show how little unanimity there is as to the identity of the places and races referred to by Pliny in his Natural History.

Capitalia is beyond doubt the sacred Arbuda, or Mount Abu, which, attaining an elevation of 6,500 feet, rises far above any other summit of the Aravali range. The name of the *Narcæ* recalls that of the Nair, which the Rajput chroniclers apply to the northern belt of the desert (Tod, Rajasthan, II. 211); so St.-Martin; but according to General Cunningham they must be the people of Sarui, or 'the country of reeds, as *nar* and *sar* are synonymous terms for 'a reed,' and the country of Sarui is still famous for its reed-arrows. The same author uses the statement that extensive gold and silver mines were worked on the other side of Mount Capitalia in support of his theory that this part of India was the Ophir of Scripture, from which the Tyrian navy in the days of Solomon carried away gold, a great plenty of almug-trees (red sandalwood), and precious stones.

Oraturæ. The Oraturæ find their representatives in the Rathors, who played a great part in the history of India before the Musalman conquest, and who, though settled in the Gangetic provinces, regard Ajmir, at the eastern point of the Aravali, as their ancestral seat.

Varetatæ or *SuaratAratæ.* The Varetatæ cannot with certainty be identified.

The *Odombœræ*, with hardly a change in the form of their name, are mentioned in Sanskrit literature, for Panini (IV. 1, 173, quoted by Lassen, Ind. Alt. 1st ed. I., p. 614) speaks of the territory of Udumbari as that which was occupied by a tribe famous in the old legend, the Salva, who perhaps correspond to the Salabastræ of Pliny, the addition which he has made to their name being explained by the Sanskrit word *vastya*, which means an abode, or habitation. The word *udumbara* means the glomerous fig-tree. The district so named

lay in Kachh. [The Salabastræ are located by Lassen between the mouth of the Sarasvati and Jodhpur, and the Horatæ at the head of the gulf of Khambhat; Automela he places at Khambhat. See Ind. Alterth. 2nd ed. I., 760. Yule has the Sandrabatis about Chandravati, in northern Gujarat, but these are placed by Lassen on the Banas about Tonk.—Ed Ind. Ant.]

Horatæ is an incorrect transcription of Sorath, the vulgar form of the Sanskrit *Saurashtra.* The Horatæ were therefore the inhabitants of the region called in the Periplus, and in Ptolemy, Surastrene, that is, Gujarat. Orrhoth (Ὀῤῥοθα) is used by Kosmas as the name of a city in the west of India, which has been conjectured to be Surat, but Yule thinks it rather some place on the Purbandar coast. The capital, Automela, cannot be identified, but de St.-Martin conjectures it may have been the once famous Valabhî, which was situated in the peninsular part of Gujarat at about 24 miles' distance from the Gulf of Khambay.

The *Charmæ* have been identified with the inhabitants of Charmamandala, a district of the west mentioned in the Mahabharata and also in the Vishnu Purana under the form Charmakhanda. They are now represented by the Charmars or Chamars of Bundelkhand and the parts adjacent to the basin of the Ganges. The *Pandæ,* who were their next neighbours, must have occupied a considerable portion of the basin of the river Chambal, called in Sanskrit geography the Charmanvati. They were a branch of the famous race of Pandu, which made for itself kingdoms in several different parts of India (*a*).

It will be remarked that Mr. McCrindle and the several authorities quoted by him do not agree with Mr Wigram as regards any one of the following names:—*Capitalia, Nareæ, Oraturæ, Varetatæ, Odombœræ, Horatæ* or *Charmæ.* The only name regarding which there is anything approaching unanimity is *Pandæ.*

(*a*) Ancient India as described by Megasthenes and Arrian translated by J. W. McCrindle, pp. 145—147.

APPENDIX II.

MADRAS ACT No. III. OF 1896.

An Act to make better provision for the registration of proprietors of estates subject to the payment of revenue direct to Government in Malabar and the Wynaad.

Preamble.

WHEREAS Regulation XXVI of 1802 provides that landed property paying revenue to Government shall be registered by the Collector, and whereas such landed property in Malabar and the Wynaad has in many cases not been registered in the names of the proprietors thereof, and whereas it is desirable for the security of the public revenue to provide a summary means whereby the Collector may ascertain such proprietors, it is hereby enacted as follows:—

Short title.

1. (1) This act may be called the Malabar Land Registration Act, 1895.

Extent.

(2) It extends to the whole of the Malabar district and to that portion of the Nilgiri district which is known as South-East Wynaad.

Interpretation clause.

2. In this Act, unless there is something repugnant in the subject or context—

Estate.

"Estate" means any land which is subject, either now or prospectively, to separate assessment to land revenue payable direct to Government.

Registered.

"Registered" means registered in the public registers maintained by the Collector in accordance with the provisions of Regulation XXVI of 1802.

Proprietor or joint proprietor of an estate may apply for registration within specified time.

3. Within such time as the District Collector may fix as hereinafter provided, any person who is or claims to be the proprietor or joint proprietor of an estate and whose name is not already registered, or any other person having authority to act on his behalf, may make applica-

tion to the District Collector or to an officer empowered by him to receive such application for registration as proprietor or joint proprietor of the estate.

Collector to fix the date before which proprietor may apply for registration.

4. The District Collector shall fix for each taluk or such other local area as he may deem fit the date before which the proprietors of the estates situated therein may, under the last preceding section, apply to have their names registered and may at any time alter any date so fixed.

Proviso.

Provided that such date or altered date shall not be less than two months or more than four months from the date of the publication of the same in the District Gazette.

Publication of date fixed by the Collector.

5. Every date, fixed as provided in the last preceding section, shall be notified in the Fort St. George and District Gazettes, and by notices to be posted up at the office of the District Collector, at the Offices of the Revenue Divisional officer, District Munsif, Tahsildar, Deputy Tahsildar and Sub-Registrar of Assurances within whose local jurisdiction the local area to which the date applies is situated, and at all police stations and amsam cutcherries within such local area; and shall also be proclaimed by beat of drum within the local area to which the date applies.

Irregularity in publication not to affect validity of proceedings.

Provided that no irregularity or omission in the publication of the notices or in the proclamations referred to in this section shall affect the validity of any proceedings under this Act.

Collector to ascertain by summary inquiry the person to be registered.

Collector empowered to cause survey and demarcation of estate.

6. As soon as conveniently may be after the date so fixed, the Collector shall, on a day and at a place to be previously notified in the District Gazette, whether or not an application for registration under the preceding sections has been made and whether or not there is any dispute as to the entry to be made in the register, ascertain and determine by such summary inquiry as he thinks fit, in respect of every estate to which the date applies, the person who, in his opinion, is entitled to be registered as proprietor thereof and

shall register him accordingly; and if any such estate shall not previously have been separately surveyed or demarcated may cause it to be so surveyed or demarcated or both.

Registration in the case of estates belonging to joint proprietors, or to a religious or charitable foundation.

7. In the case of an estate belonging to joint proprietors who are members of a joint family or to a religious or charitable foundation, the estate shall be registered in the name of the managing member for the time being of such family or of the trustee, manager or superintendent for the time being of such foundation, as the case may be, who shall be described in the register as such managing member, trustee, manager or superintendent, and such registration shall be as effectual and valid as if made in the names of all the joint proprietors or of all the persons interested in such foundation.

Procedure in inquiries under sec. 6.

8. In any inquiry under section 6 the Collector shall hear any party to a dispute who attends on the day notified or on the day to which the inquiry may be adjourned, and shall receive such evidence as he may see fit; and in the case of a dispute he shall record the nature of the dispute, his decision thereon, the grounds of the decision and such other particulars as he thinks fit.

Notice of the registration to be given in certain cases.

9. (1) If the person registered under section 6 or section 7 has not made an application under section 3, the Collector shall give him notice of the registration by the publication of the fact in the District Gazette and also, if his address is known, by letter sent by post, registered.

Procedure when the person registered objects to the registration on receipt of such notice.

(2) If any person to whom notice has been given under this section objects to such registration, he may apply to the Collector within two months of the date of the publication of such notice in the District Gazette or within one month of the receipt of the registered letter containing such notice, whichever is later, to have his name removed from the register, and the Collector shall thereupon consider his objections and shall either remove his name from the register

or direct its retention therein as he may see fit; in the former case the Collector shall proceed under section 6 as if no such registration had been made.

Registration subject to revision by Collector and modification by Civil Court.

10. Every registration purporting to be made in accordance with the procedure prescribed by this Act—

(i) may be revised by the Collector on application made within three months, and

(ii) shall be subject to any decree or order which may be passed by any Civil Court of competent jurisdiction, provided that in any suit to set aside or modify such registration or in any appeal in such suit, in which suit or appeal an order or decree is passed *ex parte* against the Secretary of State for India in Council or against the Collector, neither the said Secretary of State in Council nor the Collector shall be made liable in costs.

Collector to furnish copies of the record on payment of fees.

11. On payment of the prescribed fees the Collector shall furnish to any person who may apply for the same copies of the record of every inquiry held under this Act and of every order and entry made thereunder or under Regulation XXVI of 1802.

Saving of certain provisions of Regulation XXVI of 1802.

12. Nothing in this Act shall be deemed to affect the provisions of Regulation XXVI of 1802 in respect of the mutation in the register kept by the Collector under that Regulation of the name of the proprietor registered in accordance with the provisions of this Act when a transfer of the proprietary interest in any estate takes place, whether by purchase, inheritance, gift, or otherwise.

Registered proprietor to be deemed the landholder for the purposes of Madras Revenue Recovery Act.

13. Every person registered as proprietor of an estate shall be deemed to be the landholder in respect of such estate, within the meaning and for the purposes of the Madras Revenue Recovery Act II of 1864, and no proceedings taken under the said Act against such person or against any land registered in his name shall be deemed

invalid or ineffectual by reason of any error in such registration or on the ground that such person was not the real or sole proprietor.

Joint registration of occupants and proprietors permissible in certain cases.

14. Notwithstanding anything contained in this Act or in Regulation XXVI of 1802 the Collector shall, on the application of the registred proprietor of an estate, register as occupant jointly with such proprietor any person entitled to occupy such estate under an agreement in writing for a period of not less than five years;

Provided that no such registration shall take place unless such person signifies his consent in writing to such registration or a Civil Court of competent jurisdiction passes a decree, which it is hereby empowered to do, directing such registration in pursuance of a contract entered into between the proprietor and such person whereby the latter has undertaken to pay direct to Government the amount of land revenue assessed on such estate;

Provided further that such registration shall have effect for the period of such agreement only.

Recovery of arrear of revenue from occupants jointly registered with proprietors.

15. In every case in which an occupant of an estate has been registered under the last preceding section and an arrear of revenue has accrued due in respect of such estate subsequent to such registration, the Collector may take proceedings in the first instance against such occupant under the provisions of the Madras Revenue Recovery Act II of 1864, in so far as they relate to the seizure, attachment and sale of movable property or of the crops or ungathered products of land on which an arrear is due;

Provisos.

Provided that nothing herein contained shall debar the proprietor from recovering by suit from such occupant the arrear of revenue or portion thereof which, owing to the default of such occupant, has been paid by, or recovered from, him;

Provided further that nothing contained in this section shall be deemed to affect the power of the Collector to recover from the registered proprietor of such estate under any or all of the provisions of the said Act any arrear of revenue which may

be due on such estate or on any other estate registered in the name of such proprietor.

Jurisdiction of Civil Courts barred.

16. Except as otherwise provided by this Act, no Civil Court shall have jurisdiction in any matter which the Collector is empowered by or under this Act to dispose of or shall take cognizance of the manner in which the Collector exercises any powers vested in him by or under this Act.

Payment of costs.

17. All costs of any inquiry or proceeding held before, or of any survey or demarcation directed by, the Collector under this Act shall be payable by the parties concerned and the Collector may pass such orders as he shall think fit in respect of the payment of such costs; and in the event of such costs not being paid on demand may recover the amount thereof in the same manner as if it were an arrear of land revenue and pay the sum so recovered to the person entitled to receive it.

Orders of District Collector final.

18. Notwithstanding anything contained in Regulations I and II of 1803 of the Madras Code, no appeal shall lie to the Board of Revenue from any order made by the District Collector under this Act.

Saving clause.

19. Subject to the provisions of section 13 nothing contained in this Act and nothing done in accordance with this Act shall be deemed to—

(*a*) preclude the Government or any person from bringing a regular suit for possession of or for a declaration of right to any immovable property to which the Government or such person may deem itself or himself entitled; or

(*b*) render a registration under this Act an admission on the part of the Government of the right of the person in whose name such estate may be registered or an admission of the validity of the title under which the estate is held; or

(*c*) affect the rights of the Government or of any person in respect of any estate or of any interest therein.

The Board of Revenue may make rules.

20. The Board of Revenue may after previous publication make subsidiary rules for the carrying out of the purposes of this Act, and may prescribe the fees, if any, to be paid for the

service of summonses issued under Madras Act III of 1869 in connection with inquiries and proceedings under this Act.

Power to suspend operation of Act.

21. The Local Government may by notification suspend the operation of this Act in any specified portion of the districts to which it applies and may by subsequent notification bring it again into operation.

MADRAS ACT No. IV OF 1896.

An Act to provide a form of marriage for persons following the Marumakkathayam or the Aliyasantana Law.

Preamble.

WHEREAS it is expedient to enable persons following the Marumakkathayam or the Aliyasantana Law of Inheritance to contract marriages which shall be recognized by courts of law as legal marriages and to provide for the issue of such marriages; It is hereby enacted as follows :—

Title and application.

1. This Act may be called "the Malabar Marriage Act, 1896," and it shall be applicable to all Hindus domiciled in the Presidency of Madras following the Marumakkathayam or the Aliyasantana Law of Inheritance.

Definitions.

2. In this Act unless there is something repugnant in the subject or context :

Sambandham.

"Sambandham" means an alliance between a man and a woman by reason of which they, in accordance with the custom of the community to which they belong or either of them belongs, cohabit or intend to cohabit as husband and wife.

Children.

"Children" means sons and daughters of parents whose Sambandham has been registered as a marriage under this Act, whether born before or after such registration; but shall not include step-sons or step-daughters. In the case of any one whose personal law permits adoption, "children" shall include adopted sons and daughters.

"Marriage" with its grammatical variations and cognate expressions means, except in section 3, clause (*a*), the last word of section 3, clause (*c*), section 15, clause (*a*), and the last word of section 15, clause (*c*), a Sambandham registered under the provisions of this Act.

Marriage.

"Tarwad" means and includes all the members of a joint family with community of property governed by the Marumakkathayam or the Aliyasantana Law of Inheritance.

Tarwad.

Conditions subject to which a Sambandham may be registered as a marriage.

3. A Sambandham between Hindus both or either of whom follow the Marumakkathayam or the Aliyasantana Law of Inheritance may be registered under this Act as hereinafter provided subject to the following conditions:—

(*a*) Neither party must be subject to a personal law of marriage according to which he or she, as the case may be, cannot validly contract a marriage with the other party.

(*b*) The relation of the parties must not be such in respect of consanguinity or affinity that a Sambandham between them is prohibited by any custom or usage applicable to the community to which they belong or either of them belongs.

(*c*) Neither party must at the date of the notice under section 5 have a husband or wife living whose Sambandham with her or him has been registered under this Act and which marriage is not null and void under section 15 or with whom she or he is otherwise legally married.

(*d*) The parties must not belong to different communities between the members of which, according to the custom or usage applicable to either community, cohabitation is prohibited.

(*e*) The Sambandham must have been formed in accordance with the customary ceremonies, if any, prevailing in the community to which they belong or either of them belongs.

(*f*) A party to a Sambandham who is a minor must have obtained the consent of his or her legal guardian to the registration of the Sambandham as a marriage.

Appointment of Marriage Registrars.

4. The Local Government may appoint one or more Registrars under this Act either by name or as holding any office for the time being for any portion of the territory subject to its

administration. The officer so appointed shall be called "Registrar of Marriages under the Malabar Marriage Act, 1896," and is hereinafter referred to as the "Registrar." The portion of territory for which any such officer is appointed shall be deemed his district.

Registration.

Notice of intention to register a Sambandham to be given to the Registrar.

5. When it is intended to register a Sambandham as a marriage under this Act, both or either of the parties shall give notice in the form (A) to this Act annexed to the Registrar within whose local jurisdiction either of the parties resided at the time when the Sambandham was formed or within whose local jurisdiction it is intended to form it.

Registrar to file such notices and to maintain the "Marriage Notice Book."

6. The Registrar shall file all such notices and keep them with the records of his office and shall also forthwith enter a true copy of all such notices fairly into a book to be for that purpose supplied to him by the Local Government and to be called "The Marriage Notice Book." Such book shall be open at all reasonable times without fee to all persons desirous of inspecting the same.

Copies of notice to be served on interested parties.

7. (1) Every Registrar shall on receiving any such notice forthwith cause a copy thereof to be affixed to a Notice Board in some conspicuous place in his office; and shall then serve or cause to be served at the expense of the party giving such notice a copy thereof on the other party to the Sambandham, if both parties have not joined in giving such notice, on the guardians, if any, of the parties thereto, and on the managing members of the tarwads or families to which they respectively belong.

Withdrawal of notice.

(2) If at any time before registration is effected the party by whom notice was given under section 5 signifies in writing to the Registrar that he withdraws such notice the Registrar shall, thereupon, at the expense of the party withdrawing the same, communicate the fact of withdrawal to the persons mentioned in sub-section (1).

8. (1) Any person entitled to receive a notice under sub-section (1) of section 7, any member of the tarwad or family of either party or any person having any expectancy of succession to the property, if any, of such tarwad or family of either party may within one month from the date of such service of notice object to such registration on the ground that such Sambandham or registration is in contravention of the conditions prescribed in section 3.

Persons entitled to object to registration of a Sambandham.

Grounds on which objection may be taken.

(2) Such objection shall be in writting signed by the person objecting and shall be presented by the objector or his duly authorized agent to the Registrar who shall file the same in his office. A copy of such objections shall at the expense of the objector be served on the party by whom notice was given under section 5.

Procedure of Registrar if objection is taken.

(3) On receipt of a notice of objection under section 7, the Registrar shall not proceed to register the Sambandham as a marriage until the expiry of four months from the receipt of such notice unless such notice is in the meantime withdrawn.

(4) If no such objection be made under this section and if neither party withdraws the notice under section 7, sub-section (2), such Sambandham may at any time, not being less than one month nor more than six months from the service of the notice under section 7, be registered as a marriage.

Procedure if no objection is taken.

9. Any person objecting to the intended registration of a Sambandham may, after complying with the provisions of section 8, file a suit in a competent civil court for a declaratory decree declaring that such registration would contravene one or more of the conditions prescribed in section 3.

Person objecting may file a suit in a Civil Court.

10. The Judge before whom such suit is instituted shall thereupon give the person instituting the same a certificate to the effect that such suit has been filed. If such certificate be lodged with the Registrar within four months from the receipt of notice of objection, the Samban-

Registration to be delayed pending final disposal of suit, if certificate of institution is lodged with Registrar.

dham shall not be registered as a marriage under this Act till the decision of such court has been given and the period allowed by law for appeals from such decision has elapsed; or if there be an appeal from such decision, till the decision of the Appellate Court has been given or such suit or appeal has been withdrawn or dismissed for default.

If such certificate be not lodged within the period prescribed in the last preceding paragraph, or if the suit by the objector be finally dismissed or withdrawn the Sambandham may be registered as a marriage.

Declaration to be signed before registration.

11. Before a Sambandham is registered as a marriage, the parties thereto and three witnesses shall, in the presence of the Registrar, sign a declaration in the form (B) to this Act annexed. If either party is a minor, the declaration shall also be signed by his or her legal guardian, and in every case it shall be countersigned by the Registrar.

Registrar to enter certificate of marriage in "The Marriage Certificate Book."

12. When such declaration has been made, the Registrar shall enter a certificate of marriage in a book to be for that purpose supplied to him by the Local Government and to be called "The Marriage Certificate Book" in the form (C) to this Act annexed and such certificate shall be signed by the Registrar and countersigned by the parties, three witnesses and, if either party is a minor, by his or her guardian also.

Registration at a private residence.

13. Subject to such rules as may be prescribed in that behalf by the Local Government, the Registrar may attend at the private residence of the parties or of the guardian of a party who is a minor for the purpose of such declaration and marriage certificate book being signed by them in his presence.

Fees payable to Registrar.

14. The Local Government shall prescribe the fees payable for the duties to be discharged by the Registrar under this Act.

The Registrar may demand payment of any such fee before the registration of the Sambandham or performance of any other duty in respect of which it is payable.

The said marriage certificate book shall, at all reasonable times, be open for inspection. The Registrar shall furnish certified extracts from the marriage certificate book upon payment of the fee prescribed by the Local Government therefor and such extracts shall be admissible as evidence of the due registration as marriage of the Sambandham therein mentioned.

Marriage when null and void.

15. (1) A marriage shall be null and void only—

(*a*) If either party is subject to a personal law of marriage according to which he or she as the case may be cannot validly contract a marriage with the other.

(*b*) If a relationship can be traced between the parties through some common ancestor who stands to each of them in a nearer relationship than that of great-great grandfather or great-great grandmother, and by reason of such relationship a Sambandham between them is prohibited by any custom or usage applicable to the community to which they belong or either of them belongs.

(*c*) If either party has a husband or wife living whose Sambandham with such party has been registered as a marriage under this Act and such marriage is not null and void under clauses (*a*) and (*b*) of sub-section (1) or with whom she or he has been otherwise legally married.

(2) A marriage shall not be invalid on the ground that the Sambandham or registration contravenes any of the grounds mentioned in section 3 other than those specified in clauses (*a*), (*b*) and (*c*) of sub-section (1).

Marriage not invalid by reason of irregularity in procedure.

16. (1) No marriage under this Act shall be held invalid by reason of any irregularity in the giving of notice under section 5 or of failure to give notice under section 7 to any person entitled to receive it, or by reason of any irregularity in the publication or service of the copy of such notice or in complying with the provisions of sections 5, 11 and 12.

(2) But when any person entitled to be served with copy of notice under section 7 has not been so served, it shall be competent to him to institute a suit within three months from

the date of registration of the Sambandham for cancellation of such registration on all or any of the grounds mentioned in section 3.

Maintenance.

Maintenance of wife and children.

17. (1) The wife and children shall be entitled to be maintained by the husband or father, as the case may be. In a civil suit by the wife or children for maintenance, it shall be open to the husband or father to plead all defences open in such a suit to a Hindu governed by the ordinary Hindu law.

(2) Nothing herein contained shall affect the right of the wife and children to be maintained by the tarwad.

Guardianship.

Guardianship of minor wife and children.

18. When a man's wife and children are minors maintained by him or his tarwad· he shall, subject to the provisions of the "Guardians and Wards Act, 1890," be the guardian of his wife when she is over fourteen years of age and of his children, provided that such guardianship shall not extend to the right and interest of his wife or children in the property of the tarwad to which his wife and children belong.

Divorce.

Petition for dissolution of marriage.

19. A husband and wife or either of them may present a petition for dissolution of the marriage in the court of the District Munsif within the local limits of whose jurisdiction either the husband or wife, or, in cases in which one of them alone is petitioner, the respondent has a permanent dwelling or actually and voluntarily resides or carries on business or personally works for gain at the time when the petition is presented.

Explanation.—For the purposes of this section the Madras Civil City Court shall be deemed to be the Court of the District Munsif in respect of the area within the local limits for the time being of the ordinary original Civil Jurisdiction of the High Court of Madras (*a*).

Notice to be given to other party, if petition is not joint.

20. A copy of such application when made by one party alone shall be served on the other party to the marriage at the expense of the petitioner.

(*a*) This explanation was inserted by sec. 2 of Madras Act I of 1898.

21. Six months after the presentation of a petition by both parties or in cases where the application is made by one party alone six months after the service of notice under section 20, the court shall, on the motion of the applicants or applicant, declare in writing the marriage dissolved; provided that such motion is made within seven days after the expiration of the six months or, if the court is closed, then that such motion is made on the day on which the Court is re-opened. Upon such declaration the marriage shall be deemed dissolved from the date of such declaration; and no declaration made under this section shall be held invalid by reason of any irregularity in complying with the provisions of sections 19, 20 and 21. If no such motion is made within the time herein-before prescribed the Court shall dismiss the petition.

Court to declare marriage dissolved on motion made within a specified period.

22. Where a marriage has been dissolved without the consent of the wife, she shall, notwithstanding such dissolution, be entitled to claim maintenance from the husband so long as she remains a Hindu, continues chaste, and does not form a Sambandham or contract a marriage, provided that she was not guilty of adultery uncondoned before such dissolution.

Maintenance when claimable by divorced wife.

23. Where a man following the Marumakkathayam or the Aliyasantana Law of Inheritance dies intestate in respect of his self-acquired or separate property or any portion thereof, one-half of such property or in the event of no member of his tarwad surviving him the whole of such property shall devolve on his widow if he leaves no children, or on his children in equal shares if he leaves no widow, or on his widow and children in equal shares if he leaves both widow and children.

Succession to separate property of a married man dying intestate.

24. Where a woman following the Marumakkathayam or the Aliyasantana Law of Inheritance dies intestate in respect of her separate or self-acquired property or any portion thereof one-half of such property shall devolve in equal shares upon her children and, in the event of no member of her tarwad surviving her, the whole of such property shall devolve on her husband.

Succession to separate property of a married woman dying intestate.

Service of notices under this Act.

25. Copies of notices under sub-section (1) of section 7, notice of withdrawal under sub-section (2) of section 7, copies of objections under sub-section (2) of section 8, shall be served through such officer or court as the Local Government may direct in this behalf, and the law in force for the time being for the service of summons on a defendant in a civil suit shall apply to such service.

FORM (A).

SECTION 5.

Notice of Marriage.

To

————————, a Registrar of Marriages under Act for the District of

I hereby give you notice that I intend registering as a marriage under Act . the Sambandham between me and the other party herein named and described :—

Name.	Names of tarwad and of the managing member thereof.	Names of the legal guardians (if any).	Rank or profession or calling.	Residence.	Age.	Caste.	The place in which the Sambandham was formed or is intended to be formed.
A.B...							
C.D...							

Witness my hand, this day of 189 .

(Signed)

FORM (B).

SECTION 11.

Declaration to be made separately by the Bridegroom and by the Bride.

I, A.B., hereby declare as follows :—

(1) I am a Hindu governed by the Law of Inheritance.

(2) I am years of age.

(3) The registration of my Sambandham with will not contravene any of the conditions prescribed in section 3 of Act .

(4) I consent to the registration as a marriage of the Sambandham between me and C.D. [or, if the party making the declaration is a minor, "(4) my legal guardian consents to the registration as a marriage of the Sambandham between me and C.D."].

(5) I am aware that, if any statement in this declaration is false and if in making such statement I either know or believe it to be false or do not believe it to be true, I am liable to imprisonment and fine.

(Signed) A.B. (the Bridegroom or Bride).

(Signed) G.H. } (,,) E.F. (Guardian, if any).
(,,) I.J. } Three witnesses. (Countersigned) M.N.,
(,,) K.L. } *Registrar of Marriages under Act*
for the District of

FORM (C).

Section 12.

Marriage Certificate.

I, E.F., certify that, on the of 189 , appeared before me A.B. and C.D., each of whom in my presence and in the presence of three witnesses, whose names are signed hereunder, made the declarations required by Act and that the Sambandham between them was registered as a marriage under the said Act in my presence.

(Signed) E.F.,
Registrar of Marriages under Act
for the District of

(Signed) G.H. } (Signed) A.B.
(,,) I.J. } Three witnesses. (,,) C.D.
(,,) K.L. } (,,) M.N. (Guardian, if any).

Dated the day of 189 .

MADRAS ACT No. V of 1898.

An Act to declare the testamentary power of persons governed by the Marumakkathayam or the Aliyasantana Law of Inheritance, and to provide rules for the execution, attestation, revocation and revival of the wills of such persons.

Preamble.

WHEREAS doubts have arisen regarding the testamentary power of persons governed by the Marumakkathayam or the Aliyasantana Law of Inheritance; and whereas it is expedient to remove such doubts, and to provide rules for the execution, attestation, revocation and revival of the wills of such persons; It is hereby enacted as follows :—

PART I,

Preliminary.

Short title.

1. (1) This Act may be called " The Malabar Wills Act, 1898."

Local extent.

(2) It extends to the whole of the Presidency of Madras; and

Commencement.

(3) It shall come into force on such date as the Local Government by notification shall appoint in this behalf.

Provided that nothing in this Act shall be deemed to affect the Hindu Wills Act, 1870.

Interpretation clause.

2. In this Act unless there be something repugnant in the subject or context,

" Minor."

(1) " Minor " means any person who shall not have completed the age of 18 years.

" Will."

(2) " Will " means any legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death.

" Codicil."

(3) " Codicil " means an instrument made in relation to a will and explaining, altering or adding to its dispositions. It is considered as forming an additional part of the will.

PART II.

Of Wills.

Persons to whom this part shall apply.

3. This part shall apply to persons domiciled in the Presidency of Madras who are governed by the Marumakkathayam or the Aliyasantana Law of Inheritance.

Persons capable of making wills.

4. Every person of sound mind and not a minor may by will dispose of property which he could legally alienate by gift *inter vivos* and shall be deemed to have been always competent so to dispose of such property.

Explanation I.—Persons who are deaf or dumb or blind are not thereby incapacitated for making a will, if they are able to know what they do by it.

Explanation II.—One who is ordinarily insane may make a will during an interval in which he is of sound mind.

Explanation III.—No person can make a will while he is in such a state of mind whether arising from drunkenness or from illness or from any other cause that he does not know what he is doing.

Will obtained by fraud, coercion or importunity.

5. A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

Will may be revoked or altered.

6. A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.

Saving clause.

7. Nothing contained in section 4 shall—

(*a*) affect any right established before the commencement of this Act by a final decree of a Court of competent jurisdiction ;

(*b*) authorize a testator to deprive any persons of any right of maintenance of which, but for section 4, he could not deprive them by will ;

(*c*) affect any law of intestate succession or authorize any testator to create in property any interest which he could not have created prior to this Act.

Part III.

Of the Execution, Attestation, Revocation, Alteration and Revival of Wills.

Persons to whom this part shall apply.

8. This part shall apply to persons governed by the Marumakkathayam or the Aliyasantana Law of Inheritance, whether they are domiciled in the Presidency of Madras or not.

Execution of will and codicils.

9. All wills and codicils made on or after the date of the commencement of this Act within the Presidency of Madras and all such wills and codicils made outside the said Presidency, so far as they relate to immovable property situated within the said Presidency, must be executed according to the following rules :—

1*st*.—The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

2*nd*.—The signature or mark of the testator, or the signature of the person signing for him, shall be so placed, that it shall appear that it was intended thereby to give effect to the writing as a will.

3*rd*.—The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

Incorporation of papers by reference.

10. If a testator, in a will or codicil duly attested, refers to any other document then actually written, as expressing any part of his intentions, such document shall be considered as forming a part of the will or codicil in which it is referred to.

Witness not disqualified by interest or by being executor.

11. No person, by reason of interest in, or of his being an executor of, a will, is disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

Revocation of will or codicil.

12. No will or codicil, nor any part thereof, shall be revoked otherwise than by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Effect of obliteration, interlineation or alteration in a will.

13. No obliteration, interlineation or other alteration made in any will after the execution thereof, shall have any effect, except so far as the words or meaning of the will shall have been thereby rendered illegible or undiscernible, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; save that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

Revival of a will or codicil.

14. No will or codicil, nor any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil, which shall be partly revoked and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown by the will or codicil.

Execution and revocation of will or codicil by soldiers or mariners.

15. No will or codicil made by a soldier employed in an expedition or engaged in actual warfare or by a mariner at sea and no revocation by such person of his will or codicil shall be deemed invalid by reason only of such will, codicil or revocation not being made in accordance with the provisions of this part.

APPENDIX III.

GLOSSARY.

A.

Achan.—*Lit.* father—lord. 1. The title of males in the royal family of Palghat; 2. the minister of the Calicut Rajah, known as *Mangat Achan;* 3. the minister of the Cochin Rajah, known as *Paliyat Achan;* 4. the minister of the 2nd Rajah of Calicut, known as *Cheruli Achan.*

Achandrarkam.—*Lit.* as long as the sun and moon endure. A perpetual tenure.

Acharam.—Established custom; dues.

Adhigari.—The head of the Amsam or parish, corresponding to the Manigar in east coast districts.

Adima.—Feudal dependency of a Nayar upon his patron. Slavery.

Adiyan.—*Adi,* foot. A servant or slave (Gundert's Dictionary). The term literally means a slave, but is usually applied to the vassals of Tamburans and other powerful patrons. Each Adiyan had to acknowledge his vassalage by paying annually a Nuzur to his patron and was supposed also to be ready to render personal services whenever needed. This yearly Nuzur, which did not exceed generally one or two fanams, was called Adimapanam.

Alavu Paimash.— *Vide* Janma Paimash.

Ali-Kuli-Kanam.—*Alivu* (expense), *Kuli* (pit).—The expenses of the tenant in improving land which are paid to him on determination of the lease.

Alisilavu.—The expense of preparing garden lands for cultivation.

Aliya-Santanam.—Inheritance in the female line. The Canarese equivalent of Marumakkathayam.

Aliya-Santanada Kattu Kattale.—A treatise on the customs of S. Canara. This book is alleged to be the work of Bhutala Pandiya but is a recent forgery.

Ambalavasi.— A name applied to the many sub-divisions of the Nayar caste the members of which are temple servants.

Amsapatram.—*Amsam* = share, part; *Patra* = leaf. A deed of division of hereditary property among relations.

Amsam.—(Share, shire). Part of a taluk. Village. Parish.

Anacharam.—Irregularity established by custom; applied to certain practices observed by Nambudris and eschewed by other Brahmans.

Anandravan.—(He who comes after). Next relation, successor, heir, generally applied to the junior member in a tarwad.

Andu or Kollam Andu.—*Andu* = year. This term is applied to an era which began in September 824 A.D. To the south of Cranganore, the year begins with the 1st day of the month of Chingam (about the 15th August). This is followed generally in the Cochin and Travancore territories. To the north of Cranganore, *i.e.*, in British Malabar and a portion of South Canara, the year begins with the 1st day of the month of Kanni (*i.e.*, about the 15th day of September) (*a*).

(*a*) This era is usually called the Quilon era. Kollam and Quilon are, I have no doubt, the same word, *i.e.*, Kovilagam, a King's palace, but it does not follow that there is any special connection between the Kollam era and the town Quilon. A kingdom called Coilum (Kollam) is alluded to by Marco Polo writing at the end of the thirteenth century as follows:—" When you quit Maabar and go five hundred miles towards the south-west you come to the kingdom of Coilum. The people are idolators but there are also some Christians and some Jews. The natives have a language of their own and a king of their own and are tributary to no one." As to this, Mr. Wigram wrote as follows in his introduction to the first edition of this book. " It has been usual to assume that Coilum must necessarily represent Quilon in Travancore, but I would venture to suggest that the assumption is hasty. The mention of Jews and Christians points to Cranganore, the capital of the Cochin Rajah, and this locality more nearly coincides with the distance of five hundred

Antarjanam.—*Antar* = inside; *Janam* = person. A term applied to Nambudri women who live in seclusion.

Anubhavam.—Grants under the form of the tenure known as *Anubhavam* are, as a rule, granted on account of service rendered or on condition of the performance of future service. The tenant cannot be ejected as long as he performs these services.

Anvali.—The male line.

Ari Janmam.—(*Ari* = rice and *Janmam* = birth, a form of perpetual grant for services in a temple by which the tenant binds himself to take a fixed quantity of rice to the temple daily which is cooked by the priest and offered to the deity and afterwards returned to the tenant. (*Vide* S. A. No. 778 of 1882 H.C.)

Attadakkam —(*Attam* = end, *Adakkam* = taking). Term applied when, on a person dying without heirs, the Rajah or reigning Sovereign takes possesion of his property.

Attaladakkam —(*Attal* = extinction, *Adakkam* = taking). Right of succession, by virtue of distant relationship, to a divided branch of a tarwad when that branch becomes extinct.

Attuveppu.—(*Aru* = river, *Veppu* = plantation). Plantations bordering the sea-shore, rivers and backwaters.

Attiper or Nir Attiper.—Acquisition by contact with water, *i.e.*, complete acquisition, a gift or transfer by pouring out water having been in former times in India

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miles from Maaber, the Chola Pandyan kingdom on the east coast whose capital was probably Tanjore or Madura. The word Coilum or Kollam, is simply a contraction of Kovilagam or King's palace, and may be equally applied to Cranganore as to many other places. Indeed Dr. Gundert expressly asserts that it was at one time applied to Cranganore. We know that it was applied to Quilandy in Malabar and to Quilon in Travancore."

In Wilson's Glossary it is stated that it is a popular error to suppose that the name of the era (Kollam) is derived from the name of the village (Quilon).

(Reference may be made to Yule's Marco Polo, 3rd edition, Vol. II., p. 377 and Anglo-Indian Glossary by Yule and Burnell, 2nd edition, p. 751, *Sub voce* Quilon.)

regarded as complete or irrevocable, the idea being that the interest of the donor in the property passed away as completely and irrevocably as the water sank into the ground to appear no more. (Note by the late Arthur Thompson, C.S.)

C.

Chalian.—Name of a caste whose profession is weaving. They follow Marumakkathayam.

Chamayam.—Lit. to prepare. Generically the expense of improving land, used specifically for fixtures, as opposed to *Kulikur*, plantations, and *Vettu Kanam*, tillages. *Kila Chamayam*, expenses of cultivation. *Pura Chamayam*, expenses of building.

Changati-Kuri.—Lit. a lottery association: a provident club in which the periodical subscriptions are drawn for by lot and each subscriber in turn receives a prize. The early prize-winner thus receives a loan, free of interest, and repayable by instalments.

Charnavan.—A member of a section of the Nayar community who used in days gone by to serve as attendants on Rajahs and nobles. They are called Menon in South Malabar.

Cherakkal.—Land appropriated for the support of Rajahs and temples.

Cherulabham.—Cheru = wet soil, *Labham* = gain, profit. The cultivators share in the profit from, or produce of, a piece of land.

Cherujanmam.—The hereditary rights and perquisites claimed in their respective villages by the village astrologer, carpenter, goldsmith, washerman, barber, etc.

Cherumakkal.—Members of an inferior caste in Malabar, who are, as a rule, toilers attached to the soil.

Chira.—Enclosure, dam, tank. A reservoir of water or tank on a small scale.

Chundipanayam.—A mortgage, in which land is pledged as security for the repayment, with interest, of a certain sum advanced, the lender being deprived of all right

to interfere in the management of the property. In some cases, it is stipulated that, on failure on the part of the borrower to pay the interest, the lender shall be placed in possession of the land. Where such stipulation exists, the lender can sustain an action for possession. In other cases, he must sue for the recovery of the principal and interest of the loan, the land being liable in the event of the money not being paid.

Transactions of this nature are sometimes called *Thodu-panayam.*

Cowle.—This term means simply engagement, but is in Malabar applied to a grant by Government authorizing the grantee to cultivate waste land.

D.

Dasi.—A non-Brahman female attendant upon a Nambudri woman.

Dayadi.—A relative. The plural embraces every member of the family however remote.

Desam.—Sub-division of an Amsam.

Desavali.—The ruler or head of a Desam.

Devasam.—Temple property; a temple.

Diksha.—Mourning and ceremonies for a deceased person.

E.

Edam or Idam.—Place. House. The distinctive name of a house or palace occupied by a member of the family of the Palghat Rajah It is also sometimes used to denote the house of a Naduvali of consequence in Palghat taluk.

Ejaman.—Master Canarese term for the head of an Aliya Santanam family. Equivalent to Karnavan.

Elayad.—An inferior class of Brahmans who usually officiate as priests for non-Brahmans.

Embran or Embrantiri.—A class of sacrificing Brahmans, chiefly Tulu Brahmans, who officiate at non-Brahman ceremonies.

Enak or Inak.—Lit. agreement; a certificate from mortgagor to mortgagee, or *vice versâ*, announcing the transfer of his interest in the property.

Eradi.—A cow-herd. A sub-division of the Nayar caste which formerly ruled in what is now the Ernad Taluk.

G.

Gramam.—A village. Applied in Malabar to a Brahmanical colony or collection of houses. Equivalent to Agraharam.

Grandhavari.—A register of documents or agreements relating to lands held by tenants under their Janmis. It is drawn up on palm leaves and kept by the Janmis.

I.

Illam.—The house of an ordinary Nambudri. The house of a Nambudripad is usually termed *mana*, of a Rajah or Tirumalpad *Kovilagam*, of a Nayar *vidu*, of a Tiyan or Iluvan *kudi*, of a Cheruman *chala* and of a Mappilla *pidika*.

Iluvan.—Tiyans in the Palghat Taluk are known as Illuvans. They follow Makkathayam.

Inangan.—A kinsman. Members of the same caste between whom Sambandham is allowed are said to be Inangans.

J.

Janmabhogam.—The share in the produce of the land which is due to the Janmi.

Janmakolu.—A grant of land made in the form of a perpetual lease as a reward for services rendered. An annual rent, which as a rule is merely nominal, is payable by a tenant holding under this tenure. It is equivalent to Karankari.

Janma Paimash.—The returns prepared in 1805-6 in connection with the Survey of Malabar District, carried out by the Collector Mr. Warden, are called the Janma Paimash Accounts. This Paimash is also known as Alavu Paimash.

Janmam.—1. Birth, birthright, hereditary proprietorship; 2. freehold property which it was considered disgraceful to alienate.

Janmi or Janmakaran.—Proprietor, landlord. The person in whom the Janmam title vests.

Janmapanayam.—One of the higher forms of mortgage by virtue of which the proprietor parts with nearly all his proprietary interest.

K.

Kaichit.—A memorandum or note. It is used especially to denote a document executed to a landlord by his tenant.

Kaividuga Otti.—The Sudder Court, in 1856, described an Otti of this nature as follows:—"The landlord in this case relinquishes the power of transferring the property to a third party and binds himself to borrow any further sum he may require, from the mortgagee only. Should the latter decline to advance the amount the landlord may pay off the mortgage and reassign the property to another party. (*Vide* also Wilson's Glossary, 1855.) In the 1st edition of this work Mr. Wigram defined a Kaividuga Otti as "a tenure higher than Otti which leaves to the Janmi merely nominal rights." In 1884, however, the High Court (I. L. R., VII Mad., 442) held that a Kaividuga Otti was redeemable. It cannot be said that there is at the present time any real difference between a Kaividuga Otti and an ordinary Otti.

Kalam.—A farm-house. A granary.

Kalari.—A gymnasium. A place where martial exercises are gone through.

Kalyanam.—Marriage.

Kalyana-Kuri.—A marriage or other entertainment to which the guests invited are expected to subscribe according to their means.

Kanam.—This word, Dr. Gundert states, is derived from the root *kanu* and its primary meaning is that which appears or is visible, hence (visible) wealth or property. He defines it as follows:—(1) Possession, goods.

(2) Mortgage. (3) Loan of money as equivalent for a mortgage. (4) Valuable consideration.

Kanam-pattam.—The rent payable by a Kanamdar. It does not usually exceed one-third of the net produce, while Verumpattam, is generally at least two-thirds.

Karankari.—*Vide* Janmakolu.

Karnavan.—The senior male in a tarwad, and therefore its head and manager.

Karaima.—The office of a Karalan or temple servant. A tenure under which lands are held by those who perform certain services in a temple. They are not liable to be ousted from the lands by the managers or trustees as long as these services are duly performed.

Karalan.—The deputy or agent of a Uralan in the management of temple affairs.

Kattakanam.—The tenure of a simple lessee who deposits in the janmi's hands a sum of money as security (*a*) for due fulfilment of his lease contract and (*b*) for payment of rent. It does not carry with it a right to hold for a term of twelve years and the security is returned without interest at the end of the lease (Logan's Malabar Manual, Vol. II., p. CXCIII. *Vide* also remarks by Mr. Reid, District Judge, N. Malabar, printed with the judgment reported in I. L. R., V Madras, 310).

Kcikuli.—This word was formerly used to denote a fee or fine paid by a tenant to the janmi upon a renewal of a lease (equivalent to Shilakasu). As it is now used, it generally means a bribe.

Keralam or Kerala.—The Western Coast from Gokarnam to Cape Comorin comprising Travancore, Cochin, Malabar and part of South Canara.

Kerala Mahatmyam.—A mythical history of Keralam in Sanskrit verse, never printed, authorship unknown, said to be one hundred and fifty or two hundred years old.

As regards this book Mr. Winterbotham writes in an appendix to the report of the Malabar Marriage Commission :—

"The 'Kerala Mahatmyam', or 'Might of Malabar' is an often-quoted chronical in Sanskrit verse, ancient manuscripts of which, on palm-leaf, are

believed to be possessed by some Nambudri, and Royal families. I am not conversant with the original, but have seen what purports to be a Malayalam version of it and in this the liberty of the Sudra woman to indulge in amorous intercourse with a plurality of lovers is expressly asserted."

It is generally believed that this work and also the Keralolpatti were written by Nambudris.

Keralolpatti.—A history of Malabar in Malayalam, author unknown, said to be about two hundred years old. There are several versions extant one of which has been printed by the German Mission.

Kol.—A measuring rod twenty-eight inches in length.

Kolatiri.—A title of the Rajah of Chirakkal.

Kolulabam.—The profit of ploughing, *i.e.*, the cultivator's share of the produce.

Kolunavan.—An occupant of land, other than the original hereditary owner, holding by lease or mortgage and under particular circumstances having the opportunity of converting his temporary tenure into a permanent one. A tenant, a lease or mortgage holder (Wilson's Glossary).

Korapuzha.—A river flowing into the sea seven miles north of Calicut and forming the traditional boundary between North and South Malabar (*a*).

Kovilagam.—Palace, dwelling-place of the Malabar Royal families.

Kudian.—A cultivating tenant.

Kudima Janmam.—A tenure under which a nominal quit-rent only is paid.

(*a*) As to this boundary Mr. Ramachendra Ayyar, who was for many years Sub-Judge of Calicut, writes in his Manual of Malabar Law (Introduction, p. 17):—

"One thing to be remarked is that the Nayar women of North Malabar do on no account cross the river Korapuzha, which is the natural boundary line between North and South Malabar, the violation of the custom inflicting forfeiture of caste. Therefore persons whom Government service or private enterprise may compel to leave for South Malabar are put to the necessity of encumbering themselves with extra wives there!"

Kudimanir.—A tenure almost equal to a freehold by which all the body of property rights is gained without the crowning dignity, the right of transferring the property to another. A payment not exceeding two fanams is annually made to the possessor of the title who can no more redeem the land. (Gundert's Malayalam Dictionary.) There appears to be very little real difference between Nirmudal, Kudimanir and Attiper.

Kudiyiruppu.—A plot of land leased out for building purposes.

Kuli-kanam.—(*Kuli*, a pit) 1. A mortgage of land for the purpose of bringing it under cultivation; 2. Money payable to a tenant for improvements.

Kulikur.—(*Kuli*, pit; *Kur*, share) The share to which the tenant is entitled for digging pits and planting trees.

Kuri.—*Vide* Changati-Kuri.

Kurvalcha.—The rank of second, third, etc., prince in a Royal family.

M.

Makkathayam.—The ordinary law of inheritance from father to son.

Malikana.—What is due to the Malik or proprietor when deprived of the management of his estates. Annual allowance to deposed Rajahs. Civil Courts are prohibited by Sec. 6 of the Pensions Act (XXIII of 1871) from entertaining a suit relating to a claim for Malikana without the sanction of Government (*vide* I. L. R., XIII Madras, 75, I. L. R., XVIII Madras, 187 and L. R., 21 I. A., 148).

Mappilla.—1. A bridegroom or son-in-law; 2. The name given to Muhammadan, Christian or Jewish Colonists in Malabar who have intermarried with the natives of the country. The name is now confined to Muhammadans.

Marumakkathayam.—The law of inheritance through the female line.

Marupattam.—A counterpart of a lease or deed executed by a tenant promising certain rent (Gundert's Malayalam

Dictionary). Reference may also be made to Parameswaran Nambudripad *v.* Ammunni Nayar (S. A 1818 of 1897. Madras Law Journal, Vol. IX., p. 300).

Melkanam.—A mortgage over and above the first mortgage; a second mortgage to a third party.

Melkoyima.—*Lit.* upper sovereignty. The right of the sovereign over temples.

Menon.—A title originally conferred by the Zamorin on his agents and writers. It is now used by all classes of Nayars. In Malabar the village karnam is called Menon.

Michavaram or *Micharam.*—The balance of Pattam or rent payable to the Janmi after the interest on the money lent or advanced by the tenant has been deducted. Equivalent to Purappad.

Modan.—High lands on which a particular kind of paddy can be grown. The oil plant, millet, etc., are also grown on such lands. The rice grown on such lands is also called Modan.

Mudal Sambandham.—Community of property as opposed to community of pollution (Pula Sambandham).

Makkuvan.—A tribe of fishermen.

Munpattam.—A lease where rent is paid in advance.

Muppa Sthanam.—In certain families the first or senior Sthanam is called Muppa Sthanam.

Muri.—A receipt.

Mussad.—An inferior class of Brahmans who are allowed to eat with Nambudris but not to intermarry with them

N.

Naduvali.—Governor of a province. Name given to petty chiefs under the old Rajahs.

Nalika.—One-sixtieth part of a day, 24 minutes.

Nambiar.—A title adopted by certain Nayars.

Nambidi.—An inferior class of Brahmans. A synonym for Elayad.

Nambissan.—A class of temple servants. In North Malabar they as a rule follow Marumakkathayam (*a*).

Nambudri.—The Malabar Brahman.

Nambudripad.—A head Nambudri. The affix 'pad' denotes superiority in rank, wealth and influence.

Nayar.—The name of one of the leading castes of Kerala. The word is akin to Naik and Naidu, and signifies a leader, a soldier.

Nedungadi.—A sub-division of the Nayar caste which formerly ruled in Neduganad (South part of Walluvanad Taluk).

Niguti.—The land tax payable to Government.

Nilam.—A rice field.

Nir Attiper.—*Vide* Attiper.

Nirmudal.—Equivalent to Nirmudalavadu, *i.e.*, water, etc. The right to water and everything else. Nirmudal and Kudimanir are identical tenures and the right acquired under them is the full ownership in everything but the name.

O.

Onam.—The national feast on the new-moon of September, when Parasu Rama is said to revisit Kerala.

Oppu.—1. Signature; 2. The fee given to a Janmi for signing a document.

Otti.—1. A pawn; 2. A usufructuary mortgage in which the usufruct extinguishes the interest.

Ottikumpuram.—A tenure higher than Otti which leaves to the Janmi merely nominal rights.

(*a*) During the hearing of Nittooli Mammassam *v.* Uranikavu Matathil (S. A. 1142 of 1900) by the High Court an attempt was made to show that the Tali-Kattu-Kalyanam, which prevails among Nambissans as among Nayars, constituted a valid marriage under Hindu Law. Issues were sent down for trial by the District Judge, a number of witnesses were examined and it was shown that there was no foundation for the contention advanced. The District Judge found that the customs prevailing among the Nambissans and Nayars as to Tali-Kattu and Sambandham did not differ in any essential characteristic. Having arrived at this conclusion the District Judge (Venkataramana Poi) proceeded to give reasons for holding that the Nambissans were a class of degraded Brahmans. His arguments cannot be accepted as sound. Almost every one of the reasons which he advances for supposing that Nambissans are of Brahmanical original would apply equally well to Nayars.

P.

Paimash.—Accounts prepared from time to time by the revenue officials in Malabar (*vide* chapter XVI).

Palisa Madakkam.—(*Palisa* = interest ; *Madakkam* = return.) A tenure exactly equivalent to Otti.

Palliyal.—A piece of ground upon which paddy is grown so that it may be transplanted afterwards into a Nanja field.

Panayam.—A pledge or pawn. When used of land, if usufructuary, it is generally called Kari-panayam or Kolu-panayam, if hypothecatory, Todu-panayam or Chundi-panayam.

Panikkar.—A teacher of gymnastics. An instructor in the use of arms and in military exercise generally.

Para.—A rice measure.

Paramba.—High land which is not capable of being inundated or irrigated artificially. It may be cultivated with Modan rice, the oil plant, etc., or with cocoanut and other trees.

Pattipura.—A dwelling-house. A gateway. A gatehouse.

Pâttamàli.—A subordinate office attached to a temple subject generally to the Uralan. The office is as a rule hereditary.

Pattam.—Rent.

Pattar.—A name given in Malabar to foreign Brahmans.

Penvali.—The female line.

Penvali Muppu.—The dignity of the first lady in a Royal family.

Peruvartham.—(*Peru*, to obtain ; *artham*, gain) A kind of conditional sale in which the transferor reserves the right of re-purchase. If he exercises this right, he must pay the full market value at the time of re-purchase.

Pisharodi.—A class of Ambalavasis who do temple service.

Poduval.—One of the Ambalavasi castes. The members are employed as a rule as temple watchmen.

Policheluttu.—*Lit.* to tear up a writing: 1. A renewal of a lease ; 2. The fee paid to a proprietor on the periodical renewal of a lease.

Pudamuri.—(*Pudava* = woman's cloth, and *muri* = cutting.) A so-called "marriage" ceremony performed among the Nayars in North Malabar. The signification of the term "cloth-cutting" is obscure and disputable.

Pukil Vivaram.—A name given to the accounts prepared in Mr. Clementson's Paimash, 1833-43.

Pula Sambandham—Relationship such as to entail pollution on the occurrence of a birth or death.

Paniyan.—A tribe of agricultural labourers living in the hilly tracts of the Wynaad.

Puramkadam.—An additional loan usually following on a kanam.

Purappad.—The net produce or net rent payable to the Janmi after deducting interest on advances made by the tenant and the Government tax (Niguti).

Putravakasam.—(*Putra* = son, and *avakasam* = right.) A term applied in North Malabar to that portion of a man's self-acquisitions which his tarwad on his death sometimes allows to his children.

S.

Sabhayogam.—An association of Nambudris supported by endowments of lands. Its affairs are managed by a committee and the income is divided periodically among the members (*vide* I. L. R., III Mad., 234) (*a*).

(*a*) Additional information as to the nature of a Sabhayogam will be found in the records connected with the portracted litigation that has gone on for the last twenty years with respect to the management of the Sukapuram Sabhayogam in Ponani Taluk (South Malabar). The object of these associations is said to be to promote Vedic sacrifices. Any Nambudri of the Sukapuram gramam who performs the Vedic sacrifices known as Somayagam and Agni is eligible as a member of the Sabhayogam. A Nambudri who performs Somayagam is called a Somayaji and one who performs Agni is termed Akkitiri. Somayajis and Akkitiris are also known as Karmies. The installation of duly qualified persons as members of the Sabha takes place once every twelve years in Sukapuram village. Disputes as to how the property of the Sabhayogam, which is of considerable value, should be managed have come three times before the High Court but it cannot be said that up till now the members have been able to arrive at any workable system of administration. (*Vide* M. Manakal

Sakshi.—Lit. witness ; a forfeit of ten to twenty per cent. on money advanced when the mortgagee wishes to surrender before the expiry of his term.

Samantan.—A title adopted by a few high and wealthy families, who claim to be above the Nayars, and to be a separate caste between the Nayars and the Brahmans. (*Vide* A. S. 202 of 1888, High Court.)

Sambandham.—(*Lit.* connexion.) The term used by the Nayars of South Malabar to denote that a man and woman are united by a *quasi* matrimonial bond. In Act IV of 1896 (Madras), Sambandham is thus defined for the purposes of that Act:—

" 'Sambandham' means an alliance between a man and a woman by reason of which they, in accordance with the custom of the community to which they belong or either of them belongs, cohabit or intend to cohabit as husband and wife."

Samudayam.—A council of Brahmans; a committee for managing common property or the concerns of a temple; the office of one who manages the affairs of a temple on behalf of the Uralans. The agent or manager who acts on behalf of the Uralans is termed a Samudayi.

Santhathi Brahmasam.—A gift to a Brahman with the right of perpetual enjoyment to him and his descendants. (I. L. R., IV Madras, 148.)

Saptapadi.—The seven steps. Part of the Brahmanical marriage ceremony on completion of which the marriage is irrevocable.

Sarvasvadanam.—Lit. the gift of the whole property ; a transfer of property to a son-in-law in a Nambudri family in trust for the issue of his marriage. (*Vide* I. L. R., IX Madras, 260 and I. L. R XI Madras, 157.)

Sasvatam.—Perpetual, used of a perpetual lease.

Paramathan Somayajipad *v.* P. Kathuli Manakal Narayanan Somayajipad. S. A. 738 of 1888, M. M. Paramathan Somayajipad *v.* P. K. Manakal Narayanan Somayajipad. S. A. 159 of 1891 and M. N. Manakal Sidharan Somayajipad *v.* M. Paramathan Somayajipad. A. S. 36 of 1900 H. C.)

Shanti.—The office of priest in a temple.

Shilakkasu.—Equivalent to Keikuli. A fee or fine paid by a tenant to a Janmi upon the renewal of a lease.

Shradha.—Offerings to the manes.

Sthani.—The holder of a Sthanam.

Sthanam.—A station, rank or dignity.

Svarupam.—A dynasty, usually confined to the four principal dynasties termed the *Kola*, *Nayaririppu*, *Perimbadappu* and *Trippa Svarupams* represented by the Kolatiri or Chirakkal Rajah, the Zamorin, and the Cochin and Travancore Rajahs.

T.

Talapattam.—A lease where head money is paid in advance.

Tali-kattu-kalyanam.—A mock marriage ceremony gone through by Nayar girls in childhood.

Tamburan. Tamburatti.—Titles given to the males and females in a Royal family.

Tamudri.—The sea King or ruler of Calicut, commonly called Zamorin.

Tara.—A village. A cluster of villages which formerly formed the unit for civil administration, corresponding to the word Amsam as now used.

Tarwad.—A Marumakkathayam family consisting of all the descendants in the female line of one common female ancestor.

Tavali.—A branch of a tarwad which has separated more or less from the parent stock.

Tirumalpad.—A member of a Royal family.

Tiyan.—(Islander.) A numerous caste below the Nayars whose hereditary profession is toddy drawing. They are said to be immigrants from Ceylon and to have introduced the cocoanut palm into Malabar.

Tusikanam.—The fee paid to the writer of a new kanam or mortgage deed.

U.

Ubhaya-pattam.—A lease of rice fields.

Undaruti panayam.—A mortgage which redeems itself within a fixed period, a proportion of the principal being

each year liquidated by the surplus usufruct after providing for payment of interest.

Uraima.—The office of an Uralan (*vide* chapter XVIII).

Uralan.—Trustee of an endowed temple.

V.

Valarthakadu.—Compensation paid to tenants for maintaining trees of spontaneous growth.

Vallodi.—A sub-division of the Nayar caste the members of which formerly ruled in Walluvanad Taluk.

Valluva Konatiri.—A title of the Rajah of Walluvanad.

Varian.—A caste of Ambalavasis.

Veppu.—A deposit; exactly equivalent to an Otti.

Verumpattam.—*Lit.* bare rent; a simple lease, but usually so arranged as to leave a bare subsistence to the tenant.

Vettu-kanam or Vettu-chamayam.—Compensation payable to a tenant for clearing and levelling land.

Vishu.—The national feast of the Vernal Equinox on the 1st Madom (10th April) on which day annual fees are presented. The Malabar Hindu New Year's day.

Vittu Valli.—Expenses of cultivation, such as ploughing, sowing, weeding, manuring, etc.

Vyavahara mala.—The title of a book relating to judicial matters which also treats of the division of the produce between the cultivator and the proprietor. Dr. A. C. Burnell writes :—

"The half Sanskrit Vyavaharamala of Malabar is of the eighteenth century" (Introduction to translation of the Daya Vibhaga, p. XIII note) (*a*).

Vyavahara Samudram.—*Lit.* the sea of law suits. The title of a poetical treatise on Malabar Law.

Z.

Zamorin.—(*Vide* Tamudri.)

In extracts from judgments of Courts, official reports, books, etc., to be found in the body of this work, the spelling of distinctive Malabar words and phrases has in many cases been modified so as to bring it into conformity with that given in this glossary.

(*a*) Major Walker states that he was informed, that this book was translated into Malayalam four thousand and two years ago! (Report on the Land Tenures of Malabar, 1801, p. 6.)

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